SUPREME COURT, U. S.

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1259

BARTHOLOMEW MANDEL &
HARRY THOMAS,

Petitioners,

v.

JOSEPH O. NOUSE,
JOSEPH E. PIEKLIK, &
HOWARD H. CALLAWAY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the Judgments of the United States District Court for the Eastern District of Michigan, Southern Division, which dismissed the Complaints in the actions against all defendants (respondents herein).

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. It is included in the Appendix, infra, at

pp. A1-A5. The decision of the Court of Appeals comprises merely an incomplete restatement of the case and a summary affirmation of the opinions of the United States District Court.

The opinions of the District Court also have not been reported.

The District Court's Memorandum opinion and order in Thomas v. Callaway (C.A. No. 40287) and Thomas v. Nouse (C.A. No. 4-70492) is included in the appendix at pp. B1-B11.

The District Court's judgment in Mandel v. Nouse and Pieklik (C.A. Nos. 39861 and 4-70025) is included in the Appendix at pp. C1-C10.

Because these cases were decided on a motion to dismiss directed at the face of the complaints, pertinent paragraphs of the complaints in Mandel v. Pieklik and Thomas v. Callaway were included in the Appendix at pp. D1-15 and pp. E1-E12 respectively.

All parties have agreed that Mandel v. Nouse and Pieklik and Thomas v. Nouse are substantially identical in matters of law and material fact and therefore petitioners believe that there is no necessity to include the complaints in Mandel v. Nouse and Thomas v. Nouse in the appendix.

Petitioners believe that the reading of the complaints included in the Appendix is of particular importance in the reading of this petition.

JURISDICTION

The date of judgment of the United States Court of Appeals for the Sixth Circuit was February 10, 1975, which was also the date of entry.

No motion for rehearing or other application has been filed which would extend the time of filing this petition.

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to Title 28, U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether there is a doctrine of unqualified executive immunity which immunizes federal officials of all ranks from personal liability for deprivations of rights, privileges and immunities secured by the United States Constitution and the Performance Rating and Classification Statutes for Civil Service employees; and if so, whether, in the instant action brought under the libel laws of the State of Michigan and under the Civil Service Statutes, supra, the doctrine is so broad as to justify the outright dismissal of complaints charging each respondent with specific wrongdoings causing defamation and deprivations of constitutionally and statutorily secured rights of petitioners.

2. Whether a United States District Court pursuant to Rule 8 of the Federal Rules of Civil Procedure, when deciding a Motion to dismiss a complaint based solely on the sufficiency of its

allegations, is required to take its allegations as true.

3. Whether the doctrine of exhaustion of administrative remedies permits a party to by-pass established avenues for review within the agency where the agency has clearly violated an important constitutional or statutory right and whether, under said doctrine, the lower courts may dismiss a complaint charging the agency with several violations of said rights and alleging that some of the charges did not come under the primary jurisdiction of the Civil Service Commission.

4. Whether due process of law was observed by respondents in effecting the defamation and discharge of petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

1. United States Constitution Admendment I:

> "Congress shall make no law respecting...the freedom of speech.."

2. United States Constitution, Amendment V:

> "No person shall be...deprived of life, liberty, or property, without due process of law;..."

3. United States Constitution Amendment XIV; Section 1:

> "No State shall...deny to any

person within its jurisdiction the equal protection of the laws." (Applicable to the Federal Government by stare decisis.)

4. Performance Rating Act of September 30, 1950 (pp. 274-276, 1970 Edition of U.S.C., 5 U.S.C. 4301 et. seq.):

4302. Performance-rating plans; establishment of.

For the purpose of recognizing the merits of employees and their contributions to efficiency and economy in the Federal service, each agency shall establish and use one or more performance-rating plans for evaluating the work performance of its employees.

4303. Performance-rating plans; requirements for.

Each performance-rating plan shall be as simple as possible and shall provide—

(1) that performance requirements be made known to all employees;

(2) that performance of the employee be fairly appraised in relation to the requirements;

(3) for use of appraisals to improve employee performance;

(4) for strengthening supervisor-employee relationships; and

(5) that each employee be kept currently advised of his performance and promptly notified of his perfor-

mance rating.

4304. Ratings for performance.

(a) Each performance-rating plan shall provide for ratings representing at least--

(1) satisfactory performance;
(2) unsatisfactory performance; and
(3) outstanding performance.

(b) An employee may be rated unsatisfactory only after a 90-day advance warning and after a reasonable opportunity to demonstrate satisfactory performance. A performance rating of unsatisfactory is a basis for removal from the position in which the performance was unsatisfactory.

4305. Review of ratings.

(a) An agency, on request of an employee of that agency, shall provide one impartial review of the performance rating of the employee....

(c) In addition to the review under subsection (a) of this section, an employee with a current performance rating of less than satisfactory, on written appeal to the chairman of the appropriate board of review established under subsection (b) of this section, is entitled to a hearing and decision on the merits of the appealed rating:...

4306. Performance-rating plans; inspection of.

(a) the Civil Service Commission

shall inspect the administration of performance-rating plans by each agency to determine compliance with the requirements of this chapter and the regulations prescribed thereunder.

(b) When the Commission determines that a performance-rating plan does not meet the requirements of this chapter and the regulations prescribed thereunder, the Commission after notice to the agency giving the reasons, may revoke its approval of the plan. After revocation, the performance-rating plan and any current ratings thereunder are inoperative and the agency thereafter shall use a performance-rating plan prescribed by the Commission.

4307. Other rating procedures prohibited.

An employee may not be given a performance rating, regardless of the name given to the rating, and a rating may not be used as a basis for any action, except under a performance-rating plan approved by the Civil Service Commission as meeting the requirements of this chapter.

5. Classification Act of October 28, 1949 (pp. 279-292, 1970 Edition of U.S.C., 5 U.S.C. 5101 et. seq.):

This Act is too lengthy to set forth verbatim.

In pertinent summary, these statutes set forth the basis for establishing the classification and qualification standards for all positions in the

Federal Service as come under the Civil Service Commission's jurisdiction. (It is specially alleged in the complaints that Nouse did not meet the Classification and Qualification Standards under this Act.)

STATEMENT OF THE CASE

On October 30, 1972, petitioners were advised by letters signed by respondent Nouse, purportedly acting in official capacity for the United States Army Tank-Automotive Command (USATACOM), Warren, Michigan, that petitioners' job performances since January 1, 1972, were "deficient". The sole basis for the charges was the allegation that petitioners had not met the requirements of (a) a non-existent performance-rating plan (prior to April 21, 1972), and (b) a patently illegal and fraudulent "plan" established by Nouse on April 21, 1972.

The letters warned petitioners that if their job performances did not "improve" to meet the requirements of the "plan" within 90 days, that an adverse action, including discharge would be initiated. The letter prejudicially forecast that "more than 90 days will 1/ be required."

In accordance with the prejudicial forecast, petitioners were subsequently informed that they had failed to "improve" within the 90-day period.

1/ The Sixth Circuit's opinion prejudicially changes the word "will" to "may". (See Opinion at pp. A3 in the appendix)

Subsequently they were served with "30-day letters" containing charges of "inefficiency," etc. and proposals for discharge of petitioners.

Petitioners were given the right to reply and they did so. However, based on the Agency's denial of petitioners' requests for answers to bills of particulars and access to evidence in the Agency's files bearing on their innocence or guilt, the replies were necessarily not "fully evidentiary."

Although petitioners replies contained allegations as to the decision-maker's wrongdoing, said decision-making officer, respondent Pieklik, did not disqualify himself, but elected to issue decisions to discharge petitioners.

As a result of these prejudicial decisions, rendered by a decision-maker who was not impartial, petitioner Mandel was discharged on May 23, 1973, and petitioner Thomas was discharged on July 20, 1973.

Previous to the charges of "inefficiency", petitioners were the "workhorses" of the department, but were treated as fifth-class civil service employees, infra. They each had a previous thirty-year plus career of satisfactory performance in the fields of electrical and mechanical engineering.

This case is similar to Scheuer v. Rhodes et al. The only difference is that a real bullet was fired into the body of Sandra Lee Scheuer on the Kent University campus, causing her death;

whereas in the instant actions, a bullet was figuratively and illegally fired into the reputations and careers of the petitioners.

As a consequence of the defamation and unjust charges, which resulted in the subsequent discharges of petitioners, actions against respondents were filed in the District Court.

1. Summary of the Complaints against Nouse and Pieklik

All complaints by petitioners initiated against respondents Nouse and Pieklik allege as to defamation (libel) of petitioners under the laws of Michigan, by virtue of respondents' abuse of position comprising violations of Federal Statutes, viz., the Performance Rating Act, 5 U.S.C. 4301 et seq. and the Classification Act, 5 U.S.C. 5101 et seq.

Jurisdiction of the District Court is alleged to arise under 28 U.S.C. 1331, 2201, and 2202, 5 U.S.C. 4301 et seq, 5101 et seq. 7501 and 7701 and 18 U.S.C. 1505 and Amendments I, V and XIV of the Constitution of the United States.

The claim as to libel is a pendent cause of action, based on the same facts, arising under the law of Michigan.

All cases arise basically from alleged violations of important constitutional and statutory employment rights of petitioners by respondents and other officers of USATACOM prior to petitioners' defamation and discharges.

All complaints are cases against Pieklik and Nouse, as individuals, since the cases seek no relief from the United States.

All parties agree that all the complaints are identical in matters of material fact and identical in matters of law.

Pertinent paragraphs of Mandel v. Pieklik are set forth at pp. 01-15 of the Appendix. 2/

2/ Allegations as to factual matter were embodied in various paragraphs of the complaints and are supported by evidence in the way of Exhibits attached to the complaints. This factual matter was relied on by petitioners in their oppositions to the Motions to dismiss. However, since the lower courts confined their opinions to and based their decisions solely on legal matters, the paragraphs pertaining to detailed factual allegations have been omitted from Mandel v. Pieklik as set forth in the Appendix. (This note also applicable to Thomas v. Callaway, as noted infra.)

2. Summary of the Complaint of Thomas v. Callaway 3/

This complaint differs from Mandel v. Pieklik and Nouse and Thomas v. Nouse in that it is directed against the United States rather than an individual. Specifically, the Complaint is directed against Howard H. Callaway; Secretary of the Army, constituting the Department of the Army, constituting the United States.

The complaint in several counts alleges as to the violations, by several officers (including Pieklik and Nouse) of USATACOM, Department of the Army, of important constitutional and statutory rights of petitioner.

The complaint alleges that petitioner exhausted all administrative remedies, through the Army Grievance System, in his endeavor to seek relief from the deprivation of said rights.

The complaint alleges that said violations of his rights were the causative factors which resulted in his subsequent defamation and discharge.

The claims as to violation of important constitutional and statutory rights arise from identically the same material facts as in Thomas v. Nouse, and Mandel v. Pieklik and Nouse.

3/ Petitioner Mandel has filed an identical action in the District Court, C.A. 40237 (E.D. Mich.), judgment in which is being held in abeyance pending the outcome of the appeal of Thomas v. Callaway.

Pertinent paragraphs of Thomas v. Callaway are set forth at pp. E1-E2 of the Appendix. 2/

3. Proceedings below.

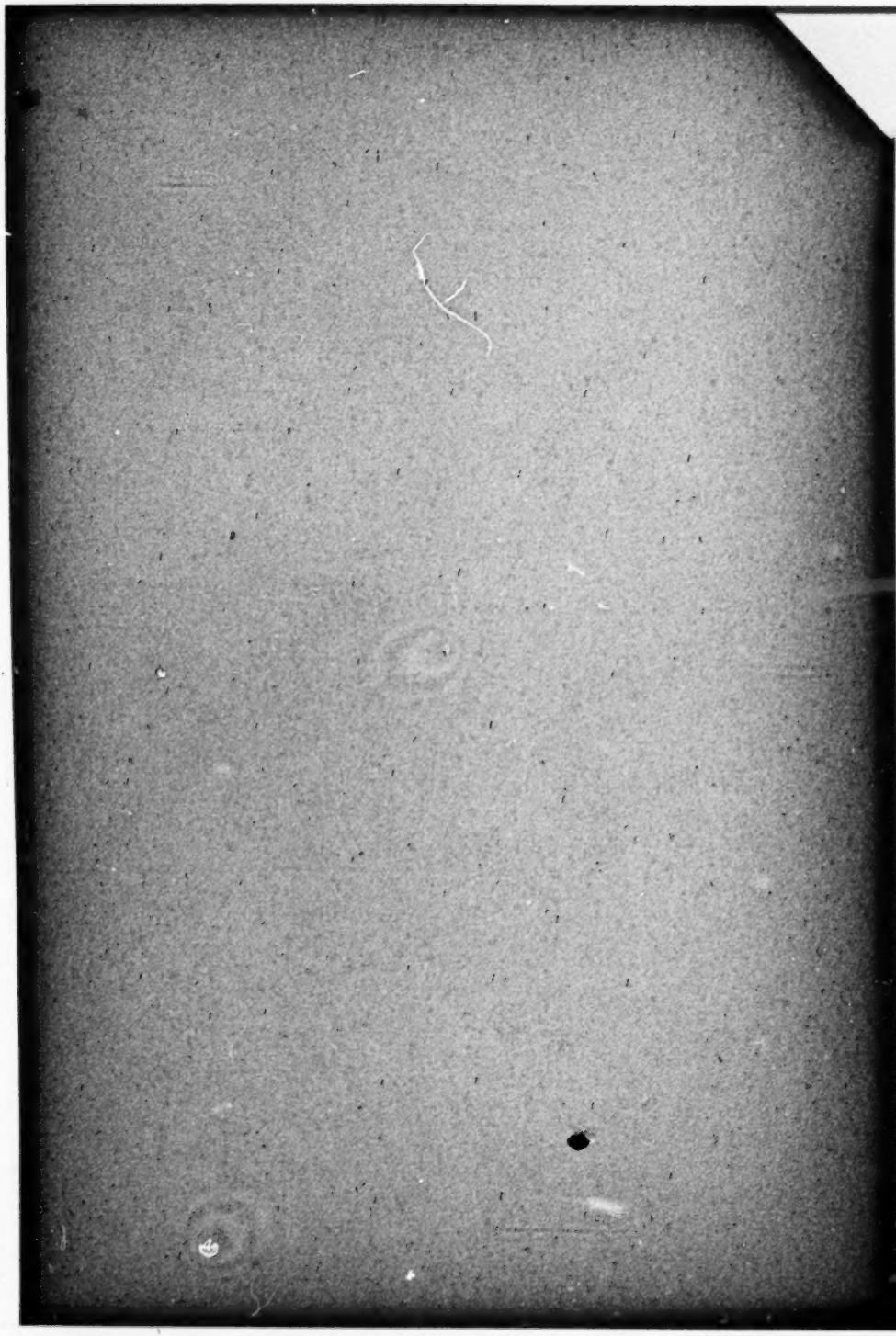
Motions to dismiss were filed in all cases in the District Court on the grounds of the doctrine of executive immunity, the doctrine of exhaustion of administrative remedies and that petitioner had not been denied due process. No factual matter was offered by respondents in support of the motions other than affidavits of Pieklik and Nouse purporting to their job appointments and duties concerning their respective positions. The contents of these affidavits have been set forth in full in the District Court's memorandum opinion and order in Thomas v. Callaway as set forth in the Appendix at pp. B1-B11.

Judge Pratt (in Mandel) and Judge Thornton (in Thomas) granted the respective motions to dismiss by merely affirming the arguments set forth by respondents.

The factual matters alleged by petitioners in their complaints were not considered by the District Court in any of the cases.

The issue of good faith of respondents was never raised, as a defense, by any of the respondents.

The appeal (after consolidation) was heard by a panel of the Sixth Circuit consisting of Judges Weick, Peck and Miller.



The Per Curiam opinion of the court, as set forth in the appendix at pp. A1-5, adds nothing new in the way of instructive legal opinion. The court's opinion is extremely narrow in that it merely is a condensed copy of the opinions issued by the District Court. The opinion affirms in all three appeals without a single comment or reference to any of the arguments or citations as set forth by petitioners.

Petitioners contend that the review of their cases was inadequately considered and is narrow and arbitrary.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents the most compelling of reasons for allowing the writ. The Court of Appeals for the Sixth Circuit has decided basic issues relating to the District Court's jurisdiction over matters pertaining to violations of constitutional and statutory rights and due process in direct conflict with that of prior controlling decisions by the Court of Appeals for the District of Columbia Circuit.

Further, the Sixth Circuit has decided basic issues relating to the doctrines of executive immunity and due process in a manner in direct conflict with a consistent line of controlling decisions of the Supreme Court. Moreover, it has done so in a case of overriding public importance and done so in a manner discrediting to the entire judicial process.

1. Executive Immunity

Based on mere denials of all wrongdoing by respondents in their answers to the complaints (except as to Mandel v. Nouse in which no answer was filed) and affidavits of Nouse and Pieklik as to their purported job descriptions, supra, the Sixth Circuit concluded that

> "Each of the defendants was acting within the outer perimeter of his official duties, and they each have immunity from civil defamation suits. Barr v. Matteo, 360 U.S. 564, 573, 574 (1959); Bramlett v. Desobry, 490 F. 2d 405 (6th Circuit 1974), cert. denied ____ U.S.L. ___ 43 U.S.L. Week 3212."

The Sixth Circuit further opines:

> "In the performance of their official duties the defendants were at all times acting as agents of the government. Any injunctive relief requiring the reinstatement of the plaintiffs or other equitable relief, would operate against the Government, and is barred on the ground of sovereign immunity." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).4/

4/ No such injunctive relief is requested in Mandel v. Pieklik and Nouse nor Thomas v. Nouse! The Sixth Circuit has clearly shown that they have not reviewed the complaints and arguments of petitioners!

In summary, the opinion of the lower courts is that the "King could do no wrong."

Petitioners contend that Nouse and Pieklik do not fall in the category of "Kings" and therefore do not have sovereign immunity. Further, the Sixth Circuit's opinion prejudicially ignores petitioners' allegations as to respondents' violations of important constitutional and statutory rights which were used as a managerial tool to effect the subsequent defamation and discharge. In effect, the Sixth Circuit has implicitly judged the allegations as untrue, or on the other hand, judged that said violations are within the "outer perimeter" or scope of respondents' duties of office. 5/

The latter proposition is probably the likely thinking of the Sixth Circuit since it is in line with their prior decisions that Barr v. Matteo and Larson v. Domestic and Foreign Commerce Corp. grant any and all government officers an unqualified, or absolute, immunity. This Sixth Circuit Court policy in effect, sets the "outer perimeter" at infinity. In other words, according to the Sixth Circuit there is no "outer perimeter." The King, or his lowest subordinate officer, can do no wrong!

5/ Respondents' have never alleged good faith whereas petitioners have alleged bad faith as supported by Exhibits attached to the complaints.

The Sixth Circuit's opinion is therefore in direct conflict with the most recent and controlling decision of this Court as rendered in Scheuer v. Rhodes decided in Case No. 72-914 on April 17, 1974, U.S. Supreme Court Slip Opinion.6/

In view of this Court's opinion in Scheuer v. Rhodes et al., supra, respondents Nouse and Pieklik, therefore, had only qualified immunity since Statutes and Constitutional provisions cited in the complaints limited their powers, manner and discretion in carrying out the duties of their respective offices.

Quoting from said Slip Opinion, Id.:

> "If immunity is qualified, not absolute, the scope of that immunity will necessarily be related to facts as yet not established by affidavits, admissions, or a trial record. Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government..." Id. at 10.

6/ In Scheuer v. Rhodes, this Court by an 8 to 0 decision overruled and reversed the Sixth Circuit on the issue of executive immunity. It is of interest to note that Judge Weick (lower Court) wrote one of the two affirming opinions in Scheuer v. Rhodes as he did in the instant action. It is also of interest to note that Judge Weick's dissenting opinion in Jones v. Perrigan, 459 F. 2d

In Monroe v. Pape, 365 U.S. 167 (1961) Mr. Justice Douglas writing for the Court, held that the section in question meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of position." (emphasis added) Id. at 11. (All complaints herein allege as to "abuse of position")

"These considerations suggest, in varying scope, a qualified immunity is available to officers of the executive branch of the Government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action.". (emphasis added) Id. at 15

"Gilligan v. Morgan, supra, by no means indicates a contrary result. Indeed, there we specifically noted that we neither held or implied that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in the judicial forum for violations of law or for specific unlawful conduct by military personnel whether by way of damages or injunctive relief." (emphasis added) Id. at 17

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81 (6th Cir. 1972) at 84-85, when compared to his decision in this case, demonstrates his refusal to adhere to stare decisis in his own circuit, as well as that laid down in this Court.

> In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as fact the good faith of the Governor, and took judicial notice that "mob rule existed at Kent State University." There was no opportunity afforded petitioners to contest the facts assumed in that conclusion." (Emphasis added) Id. at 17

Sandra Lee Scheuer, Id., was killed by the bullet fired by an Ohio National Guardsman. However, this Court's opinion would stand even if she were only wounded in any degree.

The parallel between Scheuer v. Rhodes and the instant actions is clear.

Prior to their defamation on October 30, 1972, petitioners had a 30-year plus career in electrical and mechanical engineering that was unblemished. Petitioners allege that for several years prior to said defamation and subsequent discharge, they were treated as fifth-class civil service employees. All rights relating to their job security and merit promotions under 5 U.S.C. 4301 et seq. and 5101 et seq. were denied them. It is submitted to this Court that these statutes constitute the essence of the Civil Service Merit System.

It is submitted to this Court that the doctrine of estoppel is especially applicable to this case. Estoppel is even expressly spelled out in 5 U.S.C. 4307 (pp. 7), supra.

Petitioners contend that if a civil service employee's rights under the Civil Service Statutes are not observed, that respondents Nouse, Pieklik, et al. should be estopped from proceeding to defame petitioners reputations or effect their discharge.

The illegal actions of Nouse or Pieklik did not physically kill or wound the petitioners. They did, however, stigmatize and thus virtually end the professional careers of petitioners. It is equivalent to a dishonorable discharge from the Armed Services.

There is a clear parallel between this case and the recent Watergate episode:

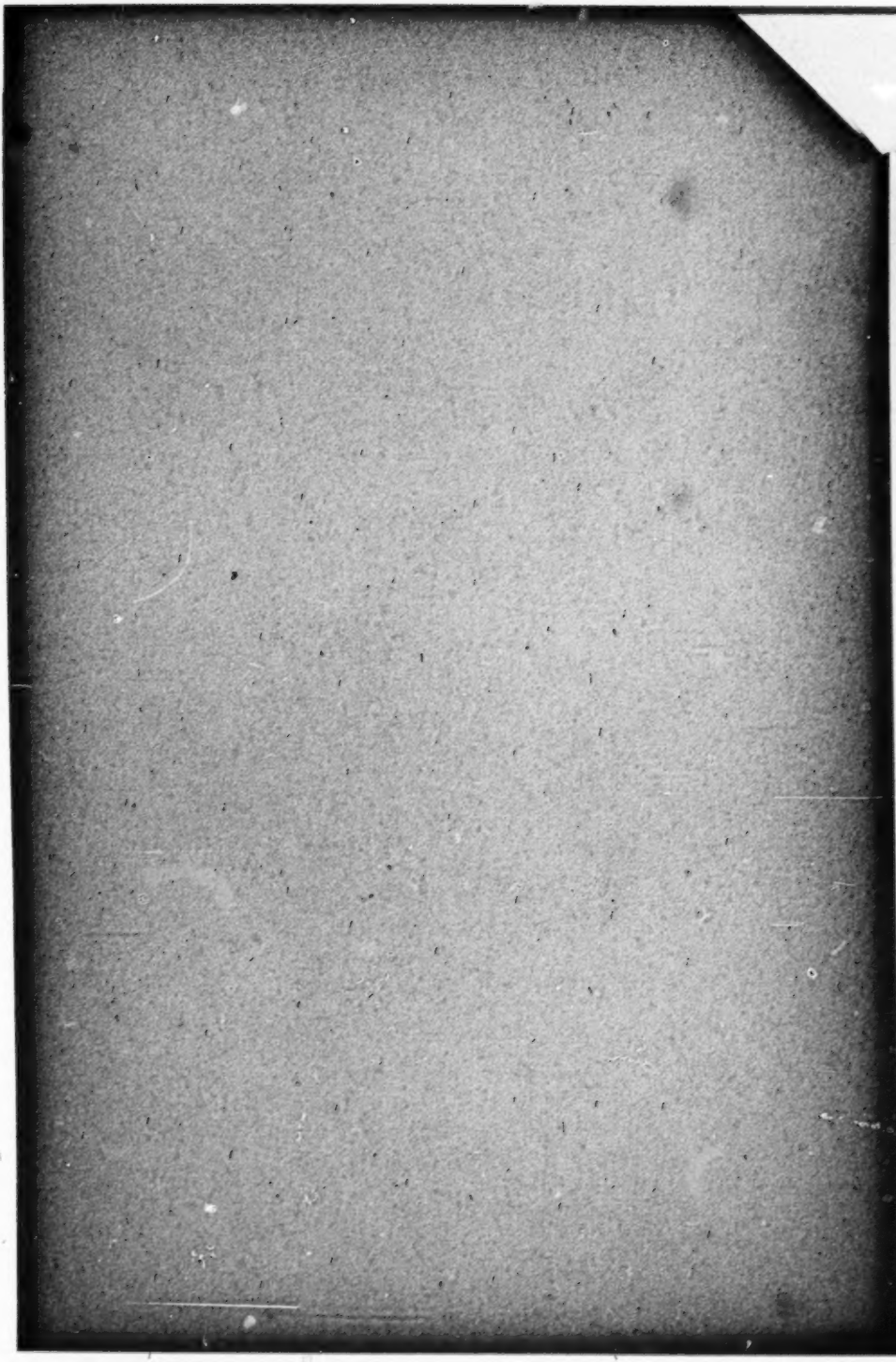
a. Complete disregard for constitutional and statutory law on the part of respondents.

b. A complete cover-up of evidence bearing on the innocence or guilt of petitioners by the Agency.

c. Decisions were rendered at the Agency level by Pieklik to defame and discharge petitioners, in spite of the allegations as to his prior wrongdoings, and that therefore he was not an <u>impartial decision-maker</u>.

d. A complete cover-up of the cesspool of ignorance and corruption that existed in Systems Analysis Division, USATACOM.

If the decision of the Sixth Circuit is



upheld, the death knell of the Civil Service Merit System will have been sounded!

In short, the decision below can only be characterized as a flagrant rejection of binding precedent. It demands review by this Court.

2. Repudiation of Rule 8, Fed. R. Civ. P.

All of the judges in the courts below have expressly refused, in their opinions, to adhere to the long-standing rule that in testing the sufficiency of a complaint, its allegations must be treated as true. See, e.g., Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 518 (1972); Jenkins v. McKeithen, 395 U.S. 411, 423-424 (1969); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

All judges implicitly took the unusual step of finding "good faith" on allegations which could only be read as alleging bad faith!

All judges below hold that respondents were acting within the "outer perimeter of their line of duty," that the "outer perimeter" is of infinite dimensions and therefore the defamation and subsequent discharges were justified.

All opinions below were based merely on affidavits filed by respondents Nouse and Pieklik alleging as to their purported job descriptions and authority, but which completely avoid the Constitutional and Statutory limitations as to their

authority. All opinions below totally ignore all the factual allegations (as supported by Exhibits) of petitioners as to bad faith, violations of important Constitutional and Statutory rights and that they were denied the right to be treated as bona-fide first-class civil service employees.

On the basis of such unprincipled conduct, it would be a rejection of reality to engage in the presumption that the lower decisions were not caused, in toto, by their view of the facts. The record supports the fair inference--indeed it is placed there by the written opinions--that petitioners have been denied the chance to prove their cases because the judges below prejudicially judged the facts submitted by respondents while totally ignoring the facts presented by petitioners, based solely on their Toryistic theory that the "outer perimeter" is infinite and that the King and his subordinates could do no wrong.

3. Doctrine of Exhaustion of Administrative Remedies

a. Mandel v. Nouse and Pieklik, and Thomas v. Nouse

The opinion below as to the doctrine of "exhaustion of administrative remedies" is discrediting to the judicial process.

The cases are against Nouse and Pieklik as individuals. None of the claims in these complaints are directed in any manner whatsoever against the United States.

The dismissal on the grounds of "executive immunity" is of course arguable, supra. However, the dismissal on the grounds of "exhaustion of administrative remedies" is beyond comprehension by jurist or layman.

Issues, as raised in the complaints, as to defamation (libel) and deprivation or violations of important constitutional or statutory rights do not fall under the appellant jurisdiction of the Civil Service Commission.

The lower opinions are completely devoid as to any statutory or other citations to the contrary!

b. Thomas v. Callaway

In this case the doctrine of "exhaustion of administrative remedies" is admittedly arguable since it is directed against the United States. Callaway is Secretary of the Army, Department of the Army.

However, petitioners contend that the lower opinions are in direct conflict with controlling decisions as rendered by the United States Court of Appeals, District of Columbia Circuit, the most experienced Circuit in Civil Service cases. 7/

7/ Compare the Sixth Circuit's narrow, arbitrary and capricious opinion in the instant action with that of the learned and fully considered opinion rendered in Fitzgerald v. Hampton, 467 F. 2d 755 (1972).

The District of Columbia Circuit, Fitzgerald v. Hampton, 467 F. 2d 755, at 768-769, clearly shows that a District Court does have primary jurisdiction; to wit:

> "(T)he courts appear to have formulated the general rule that a party may bypass established avenues for review within the agency only where...; or where the agency has very clearly violated an important constitutional or statutory right. Amos Treat & Co. v. SEC, 113 U.S. App. D.C./100, 306 F. 2d 260 (1962).

It is submitted to this Court that a valid performance rating plan, a current rating and the right to a prompt review thereof (5 U.S.C. 4301 et. seq.) and competent assignment, guidance and evaluation of an employee's work by a qualified supervisor (5 U.S.C. 5101 et seq.) comprise the essence of the Civil Service Merit System.

Prior to petitioners' defamation by the 90-day warning letters of October 30, 1972, petitioners allege in their complaints that Nouse and Pieklik deprived petitioners of all of their statutory rights under 5 U.S.C. 4301 et seq. and 5101 et seq. They also allege that their Constitutional rights to freedom of speech (to speak out freely as to their professional opinions on engineering matters), due process and equal protection under the law were denied.

The Courts' opinions below ignored the above issues, as alleged in the complaints, and therefore stand in direct

conflict with the District of Columbia Circuit and hence demands a review by this Court.

4. Due Process

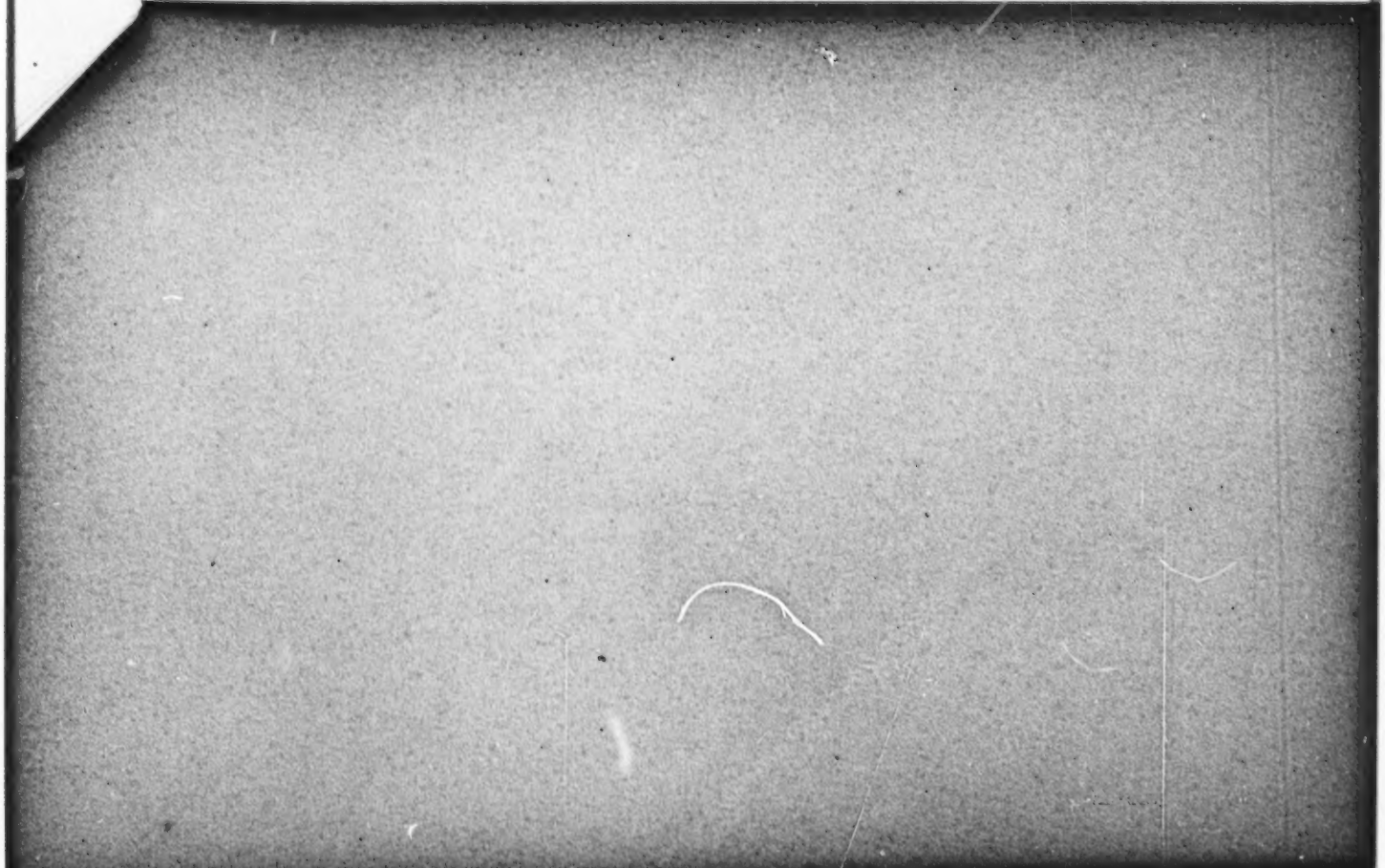
The opinions below conclude that all procedures under the Adverse Action Statutes 5 U.S.C. 7501 et seq. were observed by the Agency and hence due process was satisfied.

Petitioners contend that the Courts below adopted a viewpoint that is too narrow. However, even under this narrow viewpoint, petitioners contend that one major element of due process was not observed, namely, the right of petitioners to have their discharge proceeding decided by an impartial decision-maker.

The Sixth Circuit bases its conclusion that due process during the pre-termination hearings were based on Arnett v. Kennedy, 416 U.S. 134 (1974). Yet, in this case, the issue of the right of an employee to an impartial decision-maker in pretermination hearings was upheld by this Court! Arnett v. Kennedy

The Complaints filed, prior to the decision by Pieklik, against Nouse can only be interpreted as a series of allegations as to the wrong-doing of Pieklik. Petitioners' replies to the Agency's charges allege likewise. In short, Pieklik should have disqualified himself as decision-maker since in effect he was judging his own alleged wrong-doing.

* * *



However, it is submitted to this Court that due process should be viewed from a much broader viewpoint than that expounded by the narrow opinions below:

Petitioners for several years prior to their defamation and discharge were treated as fifth-class civil service employees.

They were denied the right to a valid performance rating plan, a competent supervisor to assign, guide and evaluate their work and were denied current ratings and review thereof, all contrary to the purpose and intent of the Performance Rating and Classification Statutes (5 U.S.C. 4301 et seq. and 5101 et seq.).

In short, petitioners were not treated as bona-fide, first-class civil service employees by the Agency since they were denied equal protection of the laws and were denied the right to have their "merits" and "contributions to efficiency and economy in the Federal Service" recognized as was their right under 5 U.S.C. 4302.

Under the broad concept of due process, as should have been accepted by the Courts below, petitioners contend that due process under the job security and promotional statutes must necessarily be observed by the Agency prior to any resort to the Adverse Action Statutes.

Clearly, such flagrant violations of important constitutional and statutory rights should be governed by the doctrine

of estoppel. The use of the Adverse Action Statutes by the Agency should be barred if it has previously failed to observe due process in the areas of job security and merit promotional rights under the same body of statutes. 8/

8/ For example, estoppel, as specifically related to the function or "outer perimeter of line of duty" of officers of the Agency, is expressly spelled out in 5 U.S.C. 4307, supra, "An employee may not be given a performance rating, regardless of the name given to the rating, and a rating may not be used as a basis for any action, except under a performance-rating plan approved by the Civil Service Commission as meeting the requirements of this Chapter."

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals. It is of vital interest to the continuance of the Civil Service Merit System and hence is of significant importance to the public welfare.

Respectfully submitted,

/s/

BARTHOLOMEW MANDEL
Petitioner
5575 Woodland Pass
Birmingham, Michigan
48010
313-626-1413

/s/

HARRY THOMAS
Petitioner
65151 Wolcott Road
Romeo, Michigan
48065
313-752-3118

DATED:
March 25, 1975

Nos. 74-1084, -1641 & -1713

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 74-1084

BARTHOLOMEW MANDEL,
Plaintiff-Appellant,

v.

JOSEPH O. NOUSE and JOSEPH E. PIEKLIK,
Defendants-Appellees.

No. 74-1641

HARRY THOMAS,
Plaintiff-Appellant,

v.

JOSEPH O. NOUSE,
Defendant-Appellee.

No. 74-1713

HARRY THOMAS,
Plaintiff-Appellant,

v.

HOWARD CALLAWAY, Secretary of the Army,
Defendant-Appellee.

APPEAL from United States District Court for the Eastern District of Michigan.

Decided and Filed February 10, 1975.

Before WEICK, PECK and MILLER, Circuit Judges.

A1

PER CURIAM. These appeals were consolidated for hearing because of the similarity of the factual and legal issues involved.

Appellants Thomas and Mandel are discharged former employees of the United States Army Tank-Automotive Command (USATACOM) at Warren, Michigan. Both appellants were discharged for inefficiency, Mandel's discharge occurring on March 22, 1973, and Thomas's on July 20, 1973. Appellee Callaway is Secretary of the Army; appellee Nouse was the immediate supervisor of Mandel and Thomas; and appellee Pieklik is the Commander of the USATACOM at Warren, Michigan.

5 U.S.C. § 4302 requires an agency to establish a performance-rating plan "for evaluating the work performance of employees." Nouse developed, or was instrumental in developing, a performance-rating plan that applied to Mandel and Thomas. Nouse was also responsible, as Thomas and Mandel's supervisor, for evaluating their work. Mandel and Thomas are both mechanical engineers.

5 U.S.C. § 4303 requires that the performance evaluation plan provide that "performance requirements be made known to all employees", and that "each employee be kept currently advised of his performance and promptly notified of his performance rating."

5 U.S.C. §§ 4306 and 4307 provide that the Civil Service Commission shall inspect such performance evaluation plans to determine if they comply with the requirements of the statute and regulations, and that a rating may not be used as the basis for any action except under an approved performance rating plan.

5 U.S.C. § 4304 reads in part:

> (a) Each performance-rating plan shall provide for ratings representing at least —
>
> (1) satisfactory performance;
>
> (2) unsatisfactory performance; and
>
> (3) outstanding performance.

> (b) An employee may be rated unsatisfactory only after a 90-day advance warning and after a reasonable opportunity to demonstrate satisfactory performance. A performance rating of unsatisfactory is a basis for removal from the position in which the performance was unsatisfactory.

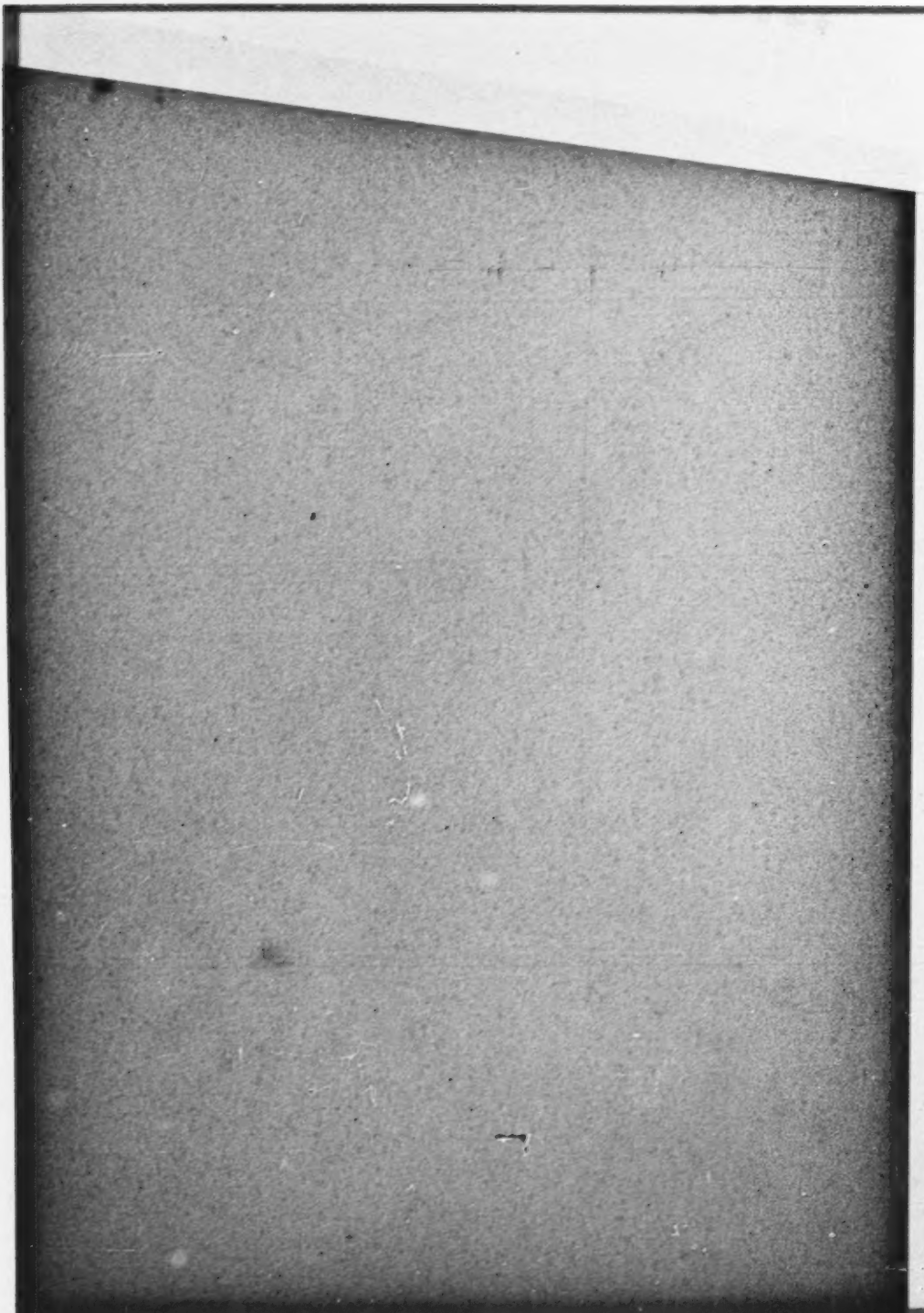
Nouse issued 90-day warning letters to Thomas and Mandel. The letter to Mandel states that his performance is "deficient" and it details the evaluation plan item by item, discussing the aspects in which his performance is deficient. It states that several of the deficiencies may take longer than 90 days to correct.

Mandel responded by filing grievances, alleging that the rating plan was unconstitutionally promulgated and arbitrarily and discriminatorily applied. The grievances were denied by the U. S. Army Civilian Review Agency.

A pre-termination hearing was denied. Appellants were notified that they had not made satisfactory progress, and they were discharged.

After receiving the 90-day warning letter, but before being discharged, Mandel filed in the District Court an action against Nouse for damages and injunctive relief, alleging that the 90-day letter was libelous and defamatory, and was published to other personnel at USATACOM; that the evaluation plan did not meet the requirements of 5 U.S.C. § 4303; and that it was discriminatorily applied.

After his discharge, Mandel filed an action in the District Court against Pieklik, claiming *inter alia* that the denial of a pre-termination hearing deprived him of his property interest in his employment without due process of law; and that Pieklik condoned and approved of Nouse's actions. Mandel alleged that the performance-rating plan and evaluation violated his right to free speech; that the plan failed to meet the requirements of 5 U.S.C. § 4303; and that the 90-day letter sent by Nouse was defamatory.



District Judge Pratt granted the defendants' motions for summary judgment, which motions were supported by affidavits. Mandel's claims for damages were dismissed with prejudice, on the ground of sovereign immunity. His claims for equitable relief were dismissed without prejudice on the ground that he failed to exhaust his administrative remedies.

Judge Pratt's opinion also discussed the doctrine of primary jurisdiction of the Civil Service Commission.

Thomas filed an action in the District Court against the Secretary of the Army, alleging that he was deprived of his property interest in his employment without due process of law as the result of the denial of a pre-termination hearing; that the 90-day letter sent to him was libelous and defamatory, and was published to certain other employees at USATACOM; and that the performance evaluation plan did not comply with the statute and was not approved by the Civil Service Commission.

Basically, Thomas's action against Nouse complained that the 90-day letter was defamatory; that the plan did not comply with the requirements of the statute; and that it infringed on Mandel's right to free speech.

After considering the exhibits filed in the matter and the affidavits of Nouse and Picklik, District Judge Thornton granted Callaway's motion to dismiss and Nouse's motion for judgment on the pleadings, on the ground that the pre-termination notices and the opportunity for a full evidentiary *post*-termination hearing under 5 C.F.R. Part 771, Subpart B, provided procedural due process, and that the actions of USATACOM officials were protected by sovereign immuity. We affirm in all three appeals.

It is clear from the evidence in this case that Nouse in the preparation of the performance-rating plan, in the evaluation of the work performance of Mandel and Thomas, and in the preparation and transmittal of the 90-day warning letters, was performing official duties imposed upon him by statute. Each of the defendants was acting within the outer perimeter

of his official duties, and they each have immunity from civil defamation suits. *Barr* v. *Matteo*, 360 U.S. 564, 573, 574 (1959); *Bramblett* v. *Desobry*, 490 F.2d 405 (6th Cir. 1974), *cert. denied*, — U.S. —, 43 U.S.L.Week 3212.

In the performance of their official duties the defendants were at all times acting as agents of the Government. Any injunctive relief requiring the reinstatement of the plaintiffs, or other equitable relief, would operate against the Government, and is barred on the ground of sovereign immunity. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

The due process claims asserted with respect to the denial of pre-termination evidentiary hearings were determined by the recent decision of the Supreme Court in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

We further agree with the District Court that the plaintiffs have not exhausted their administrative remedies before the United States Civil Service Commission which has primary jurisdiction. *United States* v. *Western Pac. R.R.*, 352 U.S. 59 (1956); *Crain* v. *Blue Grass Stockyards Co.*, 399 F.2d 868 (6th Cir. 1968).

Affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

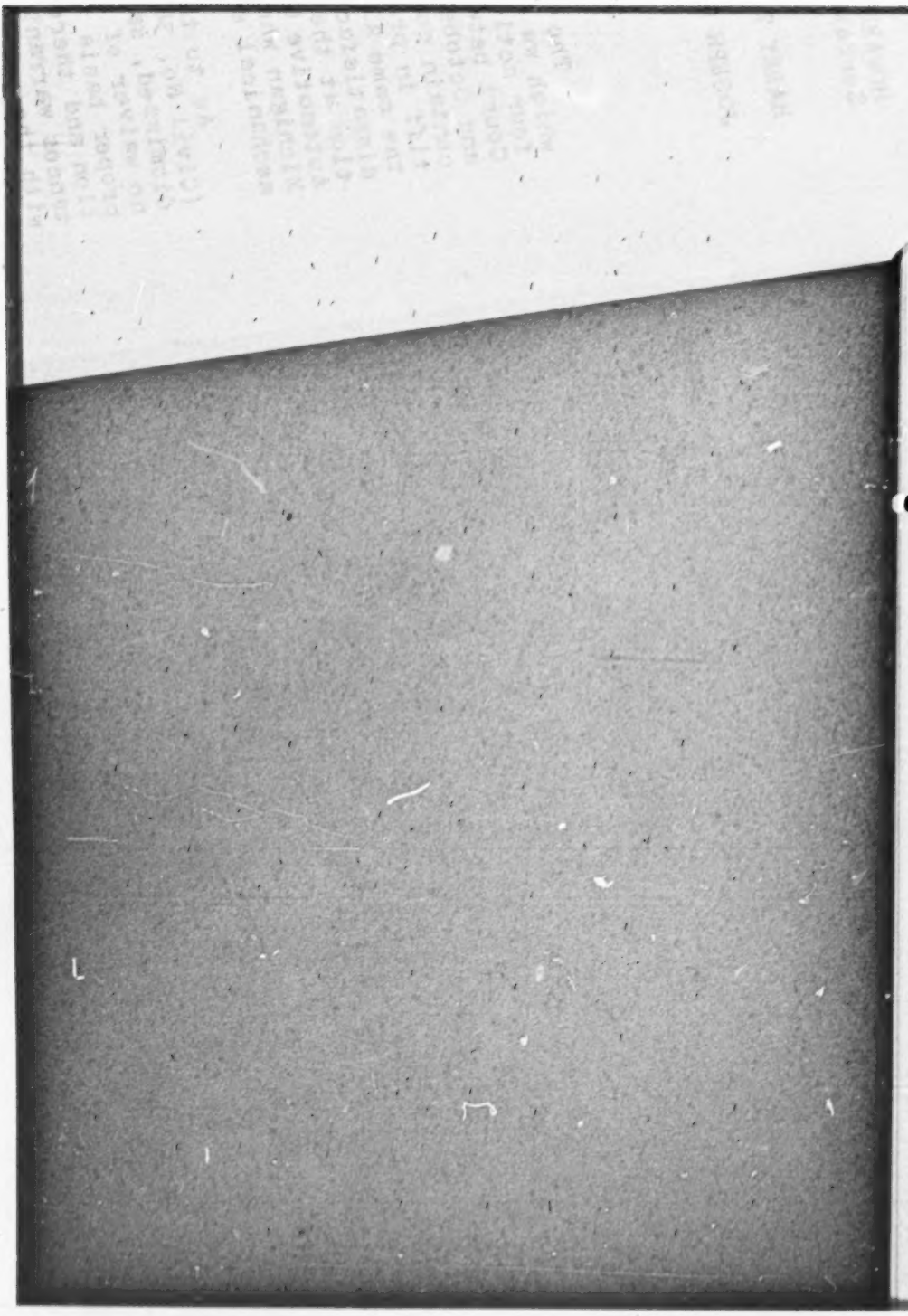
Filed March 19, 1974

HARRY THOMAS, Plaintiff,	)	CIVIL NO.
v.	)	40287
HOWARD H. CALLAWAY, Secretary of the Army, Defendant.	)	
HARRY THOMAS, Plaintiff,	)	CIVIL NO.
v.	)	4-70492
JOSEPH O. NOUSE, Defendant.	)	

MEMORANDUM AND ORDER

The two above-entitled actions with which we are here concerned are two of four actions filed by plaintiff in this Court between the dates of April 14, 1972 and October 15, 1973. All four cases contain complaints drafted by the plaintiff in pro per, and all contain basically the same allegations involving plaintiff's dissatisfaction in his employment situation at the United States Army Tank-Automotive Command (USATACOM) at Warren, Michigan where he was employed as a mechanical engineer.

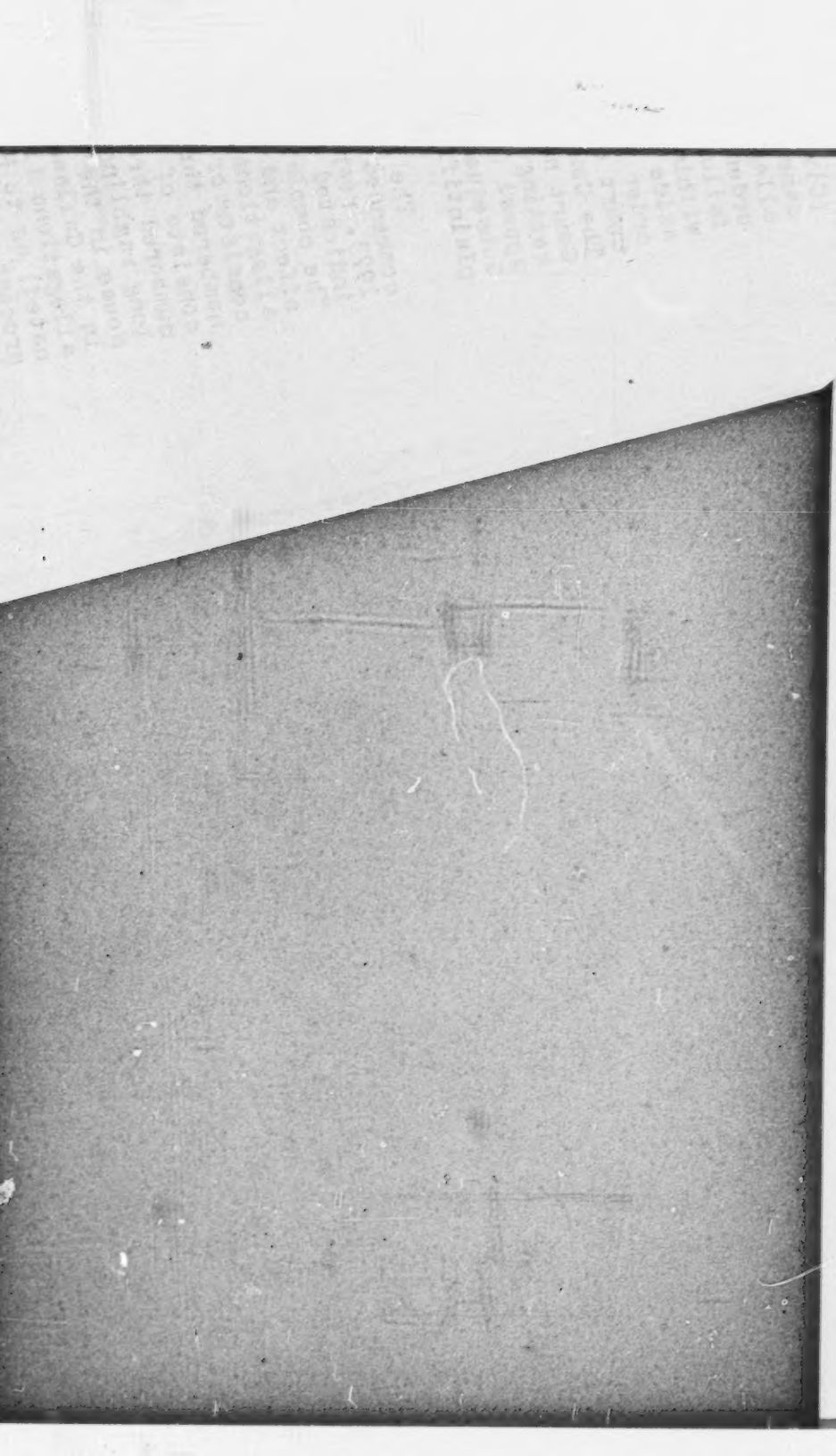
As to the case filed April 14, 1972 (Civil No. 38153) this Court ordered it dismissed, saying that "(w)e here find no waiver of sovereign immunity, no proper basis for subject matter jurisdiction and there is no showing of circumstances warranting the court's interference with the personnel management at the Tank-Automotive Command." (Order of Dismissal entered September 17, 1973.) The



defendants therein included Robert F. Froehlke, Secretary of the Army and other individuals allegedly constituting the United States Civil Service Commission.

As to the case filed November 7, 1972 (Civil No. 39182), the parties are the same as in the instant case, and the allegations practically identical. An order of default was entered therein for failure of defendant Nouse to answer within twenty days. This Court set aside the entry of default and from that order plaintiff Thomas appealed to the Court of Appeals for the Sixth Circuit. The Court of Appeals held that the District Court had not abused its discretion in setting aside the default and dismissed the appeal (No. 73-1376, July 26, 1973). Subsequently, on September 10, 1973, plaintiff voluntarily dismissed that action.

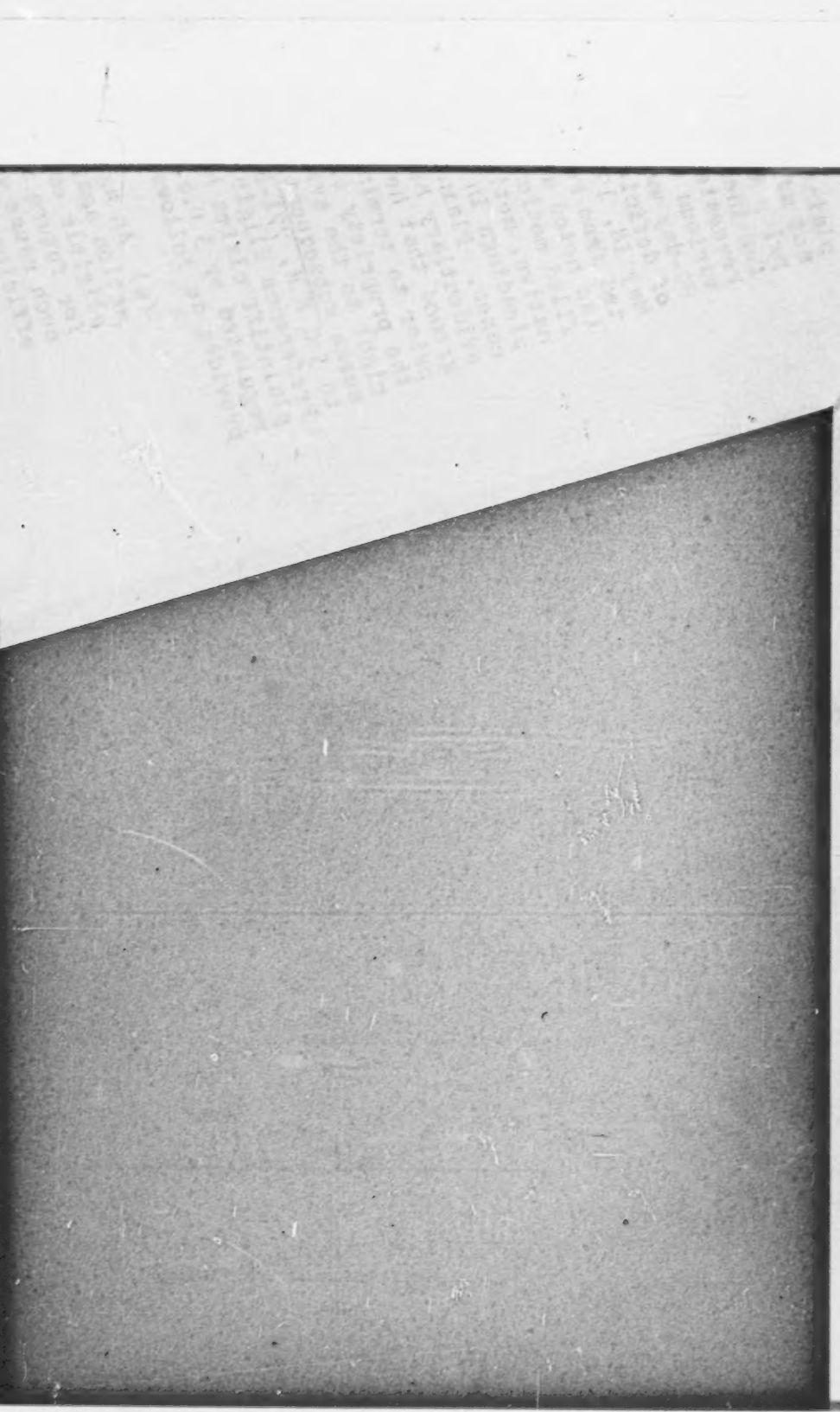
The remaining two actions are those commenced June 15, 1973 and October 15, 1973, respectively, and are entitled as indicated in the heading of this memorandum. The complaints in each are to the same effect and contain generally the same allegations. The Callaway complaint consists of six counts in paragraphs numbered through 61. The Nouse complaint consists of seven counts in paragraphs numbered through 85. Both complaints are long rambling attacks on the defendant Nouse in the one case and also on Nouse in the Callaway case. They contain allegations (if such they may be designated) as to Nouse of libel, abuse of process, misrepresentation, deceit and interference with contract rights, and numerous other charges not easily classified. It should be here noted that plaintiff was separated from Federal



Service July 20, 1973 after notice given May 18, 1973 prior to which time he was given a 90-day warning to bring his efficiency up to acceptability.

In the case filed against Callaway plaintiff's real complaint is that he was not afforded a full evidentiary hearing prior to his separation from the Service for inefficiency, although he had requested such hearing. He was given various warning letters, including the 90-day warning letter (October 30, 1972) of deficient work performance. After the May 18, 1973 notice plaintiff was separated from Federal Service, July 20, 1973 (as noted above). The Government has filed motions to dismiss or, in the alternative, motions for judgment on the pleadings in both the Callaway and Nouse cases. Plaintiff's request for a full evidentiary hearing was denied on the ground that he was not entitled to one prior to termination. His remedy to test the propriety of his discharge is his right to the evidentiary hearing he seeks subsequent to discharge, pursuant to 5 C F R, 771-B and 772. As a Preference Eligible employee (which plaintiff claims he is) his discharge is regulated by 5 U.S.C.A.§7512, which provides as follows:

> (a) An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service.
>
> (b) A preference eligible employee against whom adverse action is proposed is entitled to--

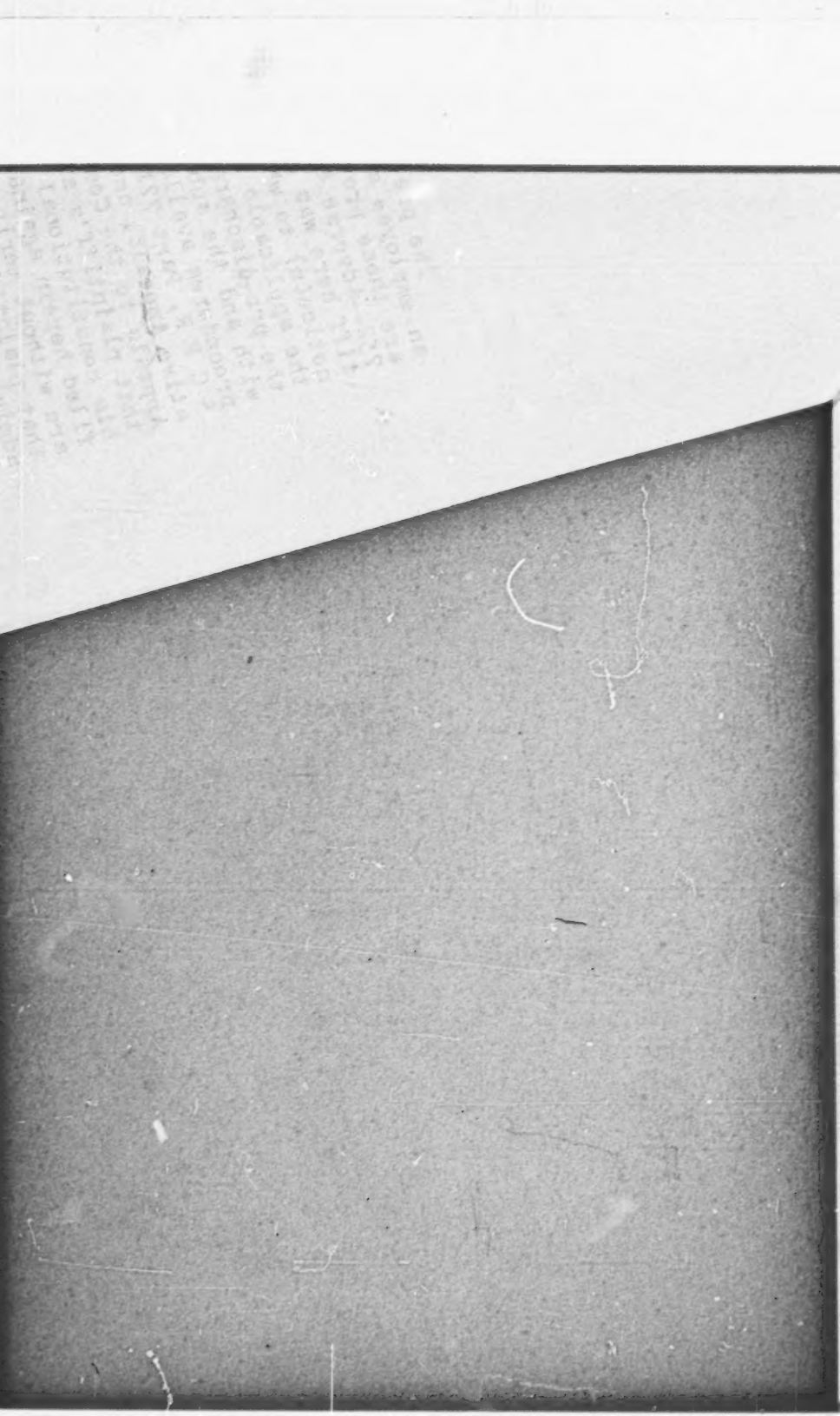


(1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;

(2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and

(3) a notice of an adverse decision.

The pre-discharge procedures to which an employee such as plaintiff is entitled are those provided for in 5 C F R, part 752--Adverse Actions by Agency. Plaintiff here was given the appropriate notice(s) to which he was entitled under the applicable regulations. In light of the pre-discharge procedure complied with and the subsequent-to-discharge procedures available to plaintiff under 5 C F R, Part 771, Subpart B--Administrative Appeals, and under 5 C F R, Part 772--Appeals to the Commission, it seems clear that plaintiff's allegations of denial of his constitutional rights in his complaint filed herein against defendant Callaway are without merit. It also seems clear that plaintiff's failure to exhaust his administrative remedies constitutes a bar to the bringing of this action.

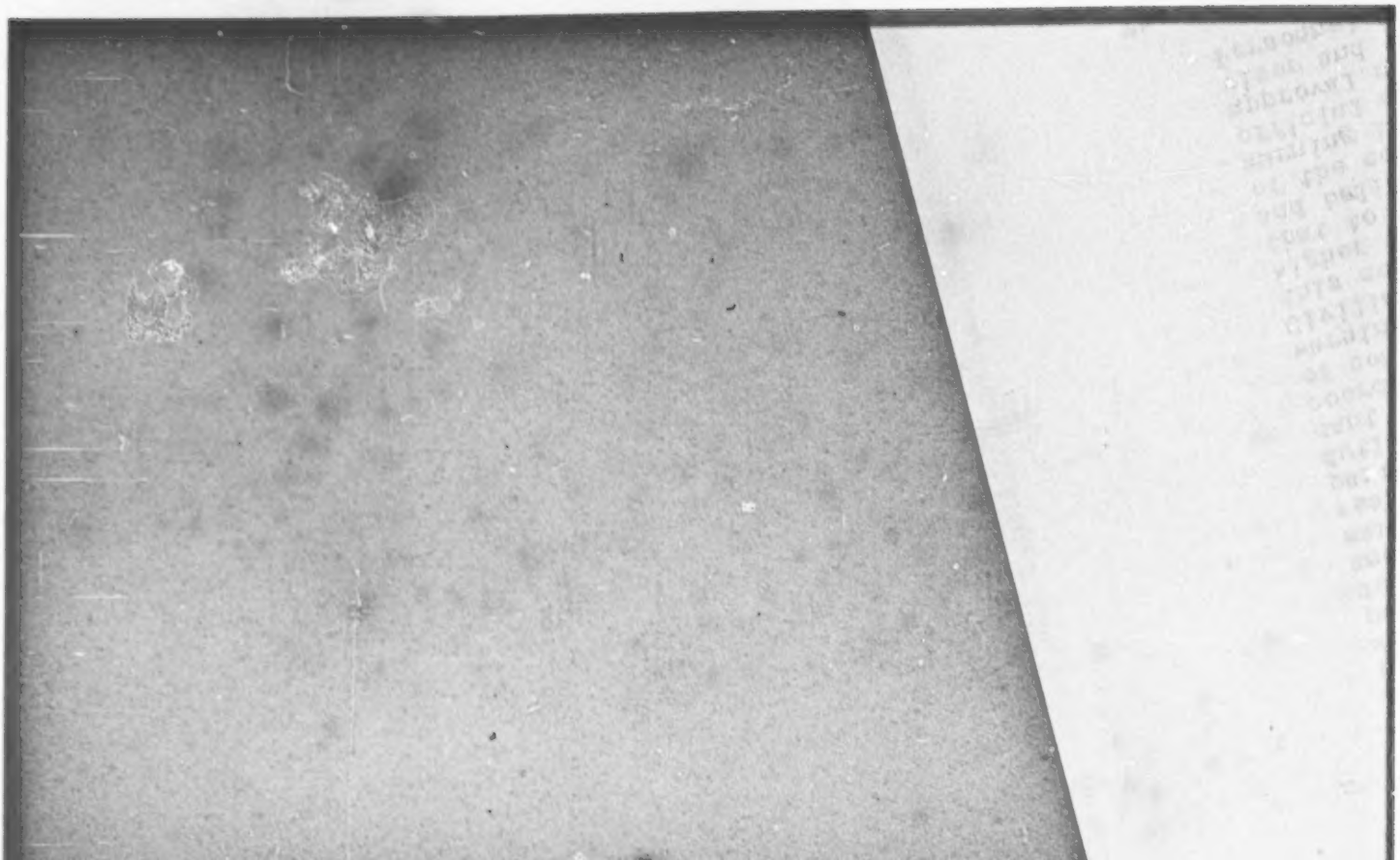


Plaintiff's complaint against defendant Nouse, his former Army superior, purports to be against Nouse, individually, for libel, defamation and numerous other types of treatment of plaintiff by Nouse. He claims that defendant Nouse acted outside his scope of duties. He also complains of a lack of a pre-discharge hearing and of Nouse' having applied an improper performance rating plan arbitrarily to him, which eventually resulted in plaintiff's separation from Federal Service. As to plaintiff's separation from the Service, what we have previously stated above with respect to the action against Callaway is applicable. Plaintiff has administrative remedies available to him which he has failed to exhaust. As to plaintiff's allegations of the defamation nature of defendant's actions, the doctrine of official immunity has direct application. By plaintiff's own allegations defendant's actions were directly connected to plaintiff's performance in his job. The fact that they were not complimentary does not offset the official capacity in which they occurred. Attached to the Motion to Dismiss or in the Alternative Motion for Judgment on the Pleadings are the Affidavits of Major General J.E. Pieklik, Commander, United States Army Tank-Automotive Command and of defendant Joseph O. Nouse, Chief, Systems Analysis Division, Plans and Analysis Directorate, United States Army Tank-Automotive Command. The affidavit of Pieklik states as follows:

> I, Major General J.E. Pieklik, Commander, U.S. Army Tank-Automotive Command, being first duly

sworn depose and say that I am the Commanding Officer over Joseph O. Nouse, the defendant named in Civil Action No. 4-70492 in the United States District Court, Eastern District of Michigan, Southern Division, that as the first level supervisor of the plaintiff in the referenced civil action, the defendant had the responsibility and authority for evaluating said plaintiff's work performance and where the performance of an employee under defendant's supervision is so poor that an unsatisfactory performance rating is indicated, defendant is responsible for and authorized to issue a 90 day warning letter; that such responsibility and authority are part of defendant's official duties; that also among defendant's official duties was the coordination with and obtaining of concurrences to the 90 day warning letter from the Civilian Personnel Office of this command and defendant's higher level supervision; and that to the best of my knowledge and belief the only communication of the contents of said 90 day warning letter was through official channels and with the approval of defendant's supervisor and the Command Civilian Personnel Office.

The Affidavit of defendant Nouse states as follows:



I, Joseph O. Nouse, residing at 4530 Motorway, Pontiac, Michigan being first duly sworn, depose and say that I am the defendant named in Civil Action No. 4-70492 in the United States District Court, Eastern District of Michigan, Southern Division, that I issued the letter dated 30 October 1972, subject: 90 Day Warning of Deficient Work Performance, which is designated as Exhibit A to plaintiff's complaint; that this letter was issued to plaintiff pursuant to my evaluation of his performance of assigned duties at that time and was in fact an official communication; that other than the issuance of such letter to the plaintiff and the necessary clerical and administrative assistance obtained to have the letter typed and prepared in accordance with appropriate regulations, and the obtaining of necessary concurrence for said letter and the reporting thereof to my superiors, no other person has had access to such letter through me; that the statements contained in such letter and my evaluations contained therein as well as my actions regarding its issuance and release were made or taken within the scope of my official duties as the Chief, Systems Analysis Division, Plans and Analysis Directorate, U.S. Army Tank-Automotive Command, and pursuant to Department of the

Army policy; that no such release outside of my official duties has been made; and that such statements and my evaluation contained in said letter are true.

Included in the file in the instant case are Exhibits A through E. Exhibit A, dated October 30, 1972, is the 90-day warning of deficient work performance sent to plaintiff by defendant. Exhibit B, dated May 18, 1973, is a letter to plaintiff from defendant consisting of sixteen pages setting forth the details of the charges upon which the proposed separation of plaintiff from service was based. Exhibit C is a letter dated June 29, 1973 from plaintiff to the Department of the Army (USATACOM), Warren, Michigan. Attention: Mr. George Blakeslee, Chief, Civilian Personnel Division, Training and Force Directorate, USATACOM, and states that its subject matter is "Reply to Charges of Joseph O. Nouse in Letter May 18, 1973.*" It consists of seven pages in contradiction of the matters set forth in the Nouse letter of May 18, 1973. Exhibit D, dated July 17, 1973, is a letter to Mr. Thomas from Major General Pieklik informing plaintiff that full consideration was given to plaintiff's letter of June 29, 1973.* We quote said letter in its entirety:

> This will refer to the letter, dated and received by you on 18 May 1973, proposing to remove you from the Federal service, based on the charges of:
>
> a. Inefficiency

*Exhibit B
Exhibit C

b. Deliberate failure to work on an assigned project, namely the Diagnostic Test Equipment (DTE) Project.

c. Failure to obey direction from proper authority, namely, failure to report your progress on the "Rebuild" Computer Modeling Project; failure to submit comments on the Emissions Control Study; and failure to comply with Mr. Sobak's order to you on 15 February 1973.

d. Making unsubstantiated defamatory statements about your fellow employees with intent to harm or destroy the reputation, authority, or official standing; namely, about Mr. Steve Sobak, Captain Krutulis and Mr. Joseph O. Nouse.

Full consideration has been given to the information in your written reply, dated 29 June 1973, and its eight inclosures. I find, however, that the charges and the supportive facts thereto, as delineated by the 18 May 1973 letter, are fully supported by substantial evidence, are sustained and warrant your removal to promote the efficiency of the Federal service. It is my decision, therefore, that you will be removed effective 20 July 1973. A Standard Form 50, Notification of Personnel Action, is enclosed effecting this action (Inclosure 1). Also inclosed are Standard Form 56, Agency

Certification of Insurance Status (Inclosure 2), and Standard Form 2810, Notice of Change in Health Benefits Enrollment (Inclosure 3).

If you so desire, you may appeal this removal under the Department of the Army Grievance and Appeals System. You may also appeal this action directly to the Regional Director, US Civil Service Commission. Either channel of appeal must be utilized no later than 15 calendar days after the effective date of your removal. Your specific appeal rights are contained in Inclosure 4.

Should you desire any further information or assistance concerning these rights or the procedural or regulatory aspects of this matter, you may contact Mr. Donald Junge of the Civilian Personnel Division on extension 31442.

Exhibit E, dated April 21, 1972, is a seven-page JOB STANDARDS FORM setting forth the job standards for plaintiff's position, presented to plaintiff informing him that defendant Nouse "will be glad to discuss them with you" if plaintiff should so desire.

Based on the pleadings, affidavits and exhibits on file in the Nouse case, the Court concludes that defendant's Motion for Judgment on the Pleadings should be granted.

As to case No. 40287, Thomas v. Callaway, defendant's Motion to Dismiss

is hereby granted and it is so ordered.

As to case No. 4-70492, Thomas v. Nouse, defendant's Motion for Judgment on the Pleadings is hereby granted and it is so ordered.

A TRUE COPY

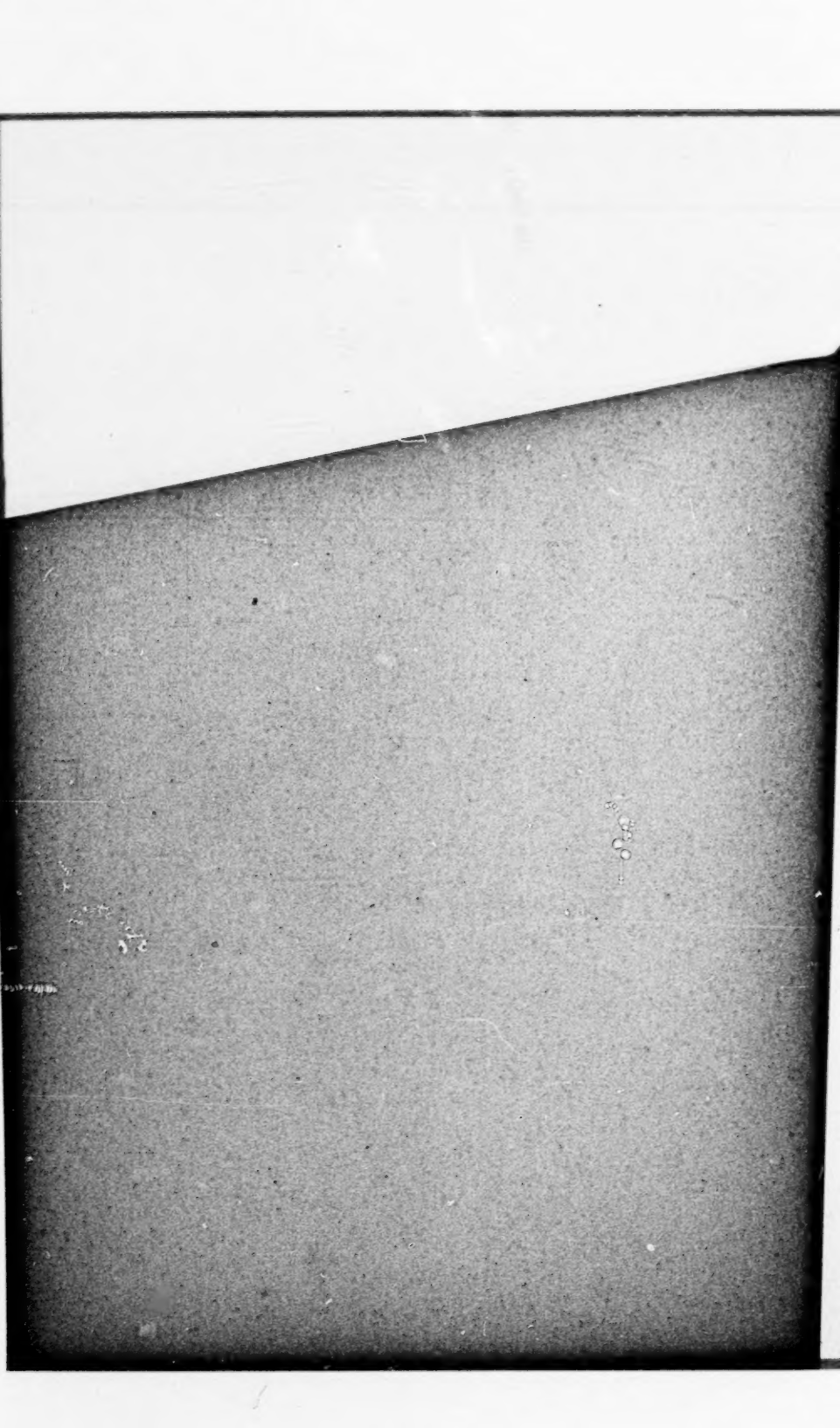
HENRY R. HANSSEN, Clerk

BY: Mortin Crandell
Deputy Clerk

THOMAS P. THORNTON

Thomas P. Thornton
United States District Judge

Dated: Mar 19, 1974



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Filed Nov. 8, 1973

BARTHOLOMEW MANDEL, Plaintiff,) CIVIL ACTION NO. 39861
v.
JOSEPH O. NOUSE, Defendant.)

BARTHOLOMEW MANDEL, Plaintiff,) CIVIL ACTION NO. 4-70025
v.
JOSEPH E. PIEKLIK, Defendant.)

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff herein is a discharged former employee of the United States Army Tank-Automotive Command (USATACOM) in Warren, Michigan. He instituted these two actions against defendant Nouse, his former immediate supervisor, and defendant Pieklik, the officer in charge of USATACOM in Warren. Because of the similarity of factual and legal issues, the Court consolidated the actions.

Plaintiff alleges that he was improperly discharged and that he was defamed. He seeks a declaratory judgment, equitable relief and money damages. The basis for his claims are that the defendants acted outside the scope of their respective, lawful duties, that their actions involving his performance rating and discharge were defamatory or otherwise unlawful and that the failure to

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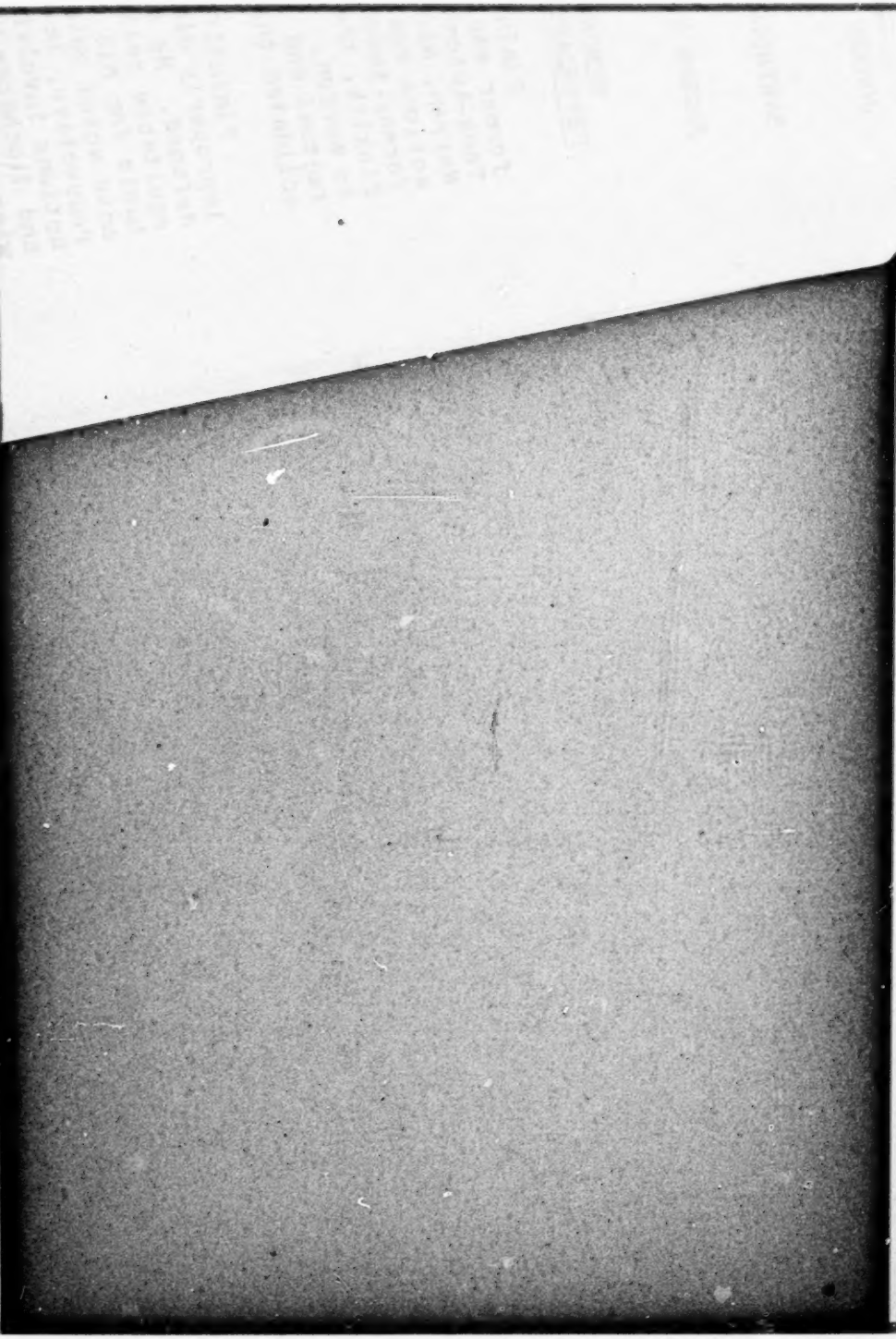
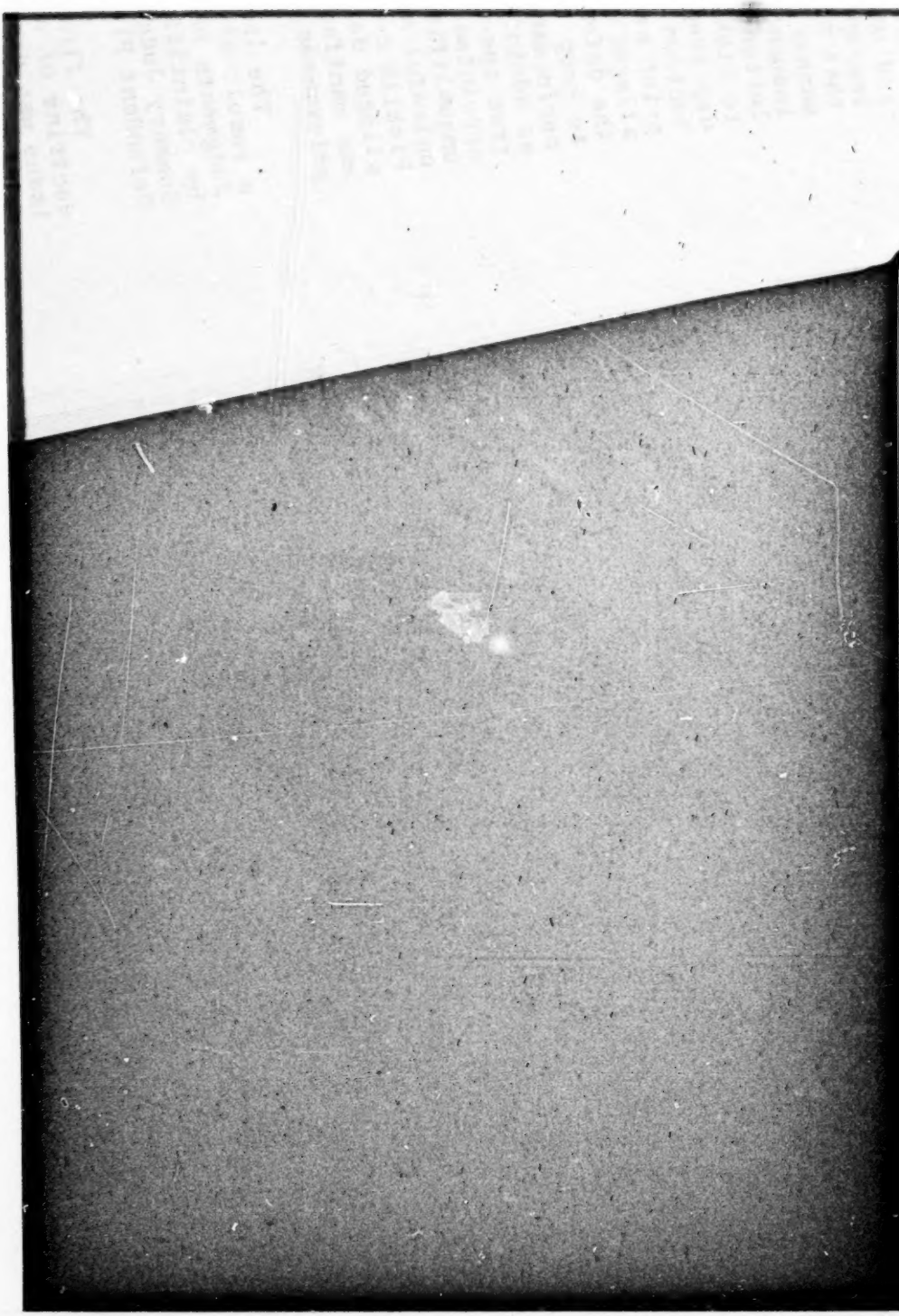


conduct a hearing before his discharge denied him due process.

Plaintiff's complaints, as amended, contain, of course, more detailed allegations. In paraphrase, plaintiff alleges that defendant Nouse unlawfully and unconstitutionally promulgated an improper performance rating plan, applied that plan in a discriminatory and arbitrary manner, defamed the plaintiff by the issuance of a deficient work performance letter and wrongfully discharged him. As to Pieklik, plaintiff alleges he was deprived of due process and equal protection by being discharged without a prior hearing and on the basis of the allegedly unlawful performance plan; that the defendant Pieklik unlawfully failed to keep the plaintiff informed of his performance; that the performance plan as administered violated his rights of free speech; that defendant Pieklik appointed defendant Nouse knowing he was unqualified and approved the latter's unlawful actions; and that the defendant Pieklik condoned the issuance of the alleged defamatory performance letter as was manifested by the denial of plaintiff's grievances.

The issues come before the Court as a result of the Motions for Summary Judgments brought by the defendants and by plaintiff's Motion for Partial Summary Judgment and his Motion to Strike Defendant Pieklik's Affirmative Defenses.

The first issue deals with the doctrine of official immunity. This issue was discussed in this Court's opinion which denied defendant Nouse's



Motion to Dismiss. The submission of the issue now under a Motion for Summary Judgment includes affidavits of the defendants which plaintiff has not contradicted, apparently being content to rely on a type of per se theory, i.e., the acts of defendants were unlawful, therefore, immunity cannot apply. Such is not the teaching of the immunity doctrine which has its current base in Barr v. Matteo, 360 U.S. 564 (1959). In Barr, the Supreme Court was dealing with an action for damages resulting from an alleged libelous statement by a government official. The Court held that the official involved was protected by an absolute immunity if the allegedly libelous statement was made "within the outer perimeter" of his duties.

While Barr was a libel cause of action, the immunity doctrine has also been applied to other types of actions. In Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2nd Cir. 1972) Judge Medina explored the scope and application of the doctrine and emphasized the dual requirements that the official must be acting within the outer perimeter of his official duties and that he must be performing "...discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority,..." citing Barr v. Matteo, supra, at 575.[1]

Another facet of the immunity doctrine was underscored in Doe v. McMillan, 412 U.S. 306 (1973) when the Supreme Court quoting from Barr v.

1/ Bivens was cited with approval in Jones v. Perrigan, 459 F. 2d 81 (6th Cir. 1972).

Matteo, said:

> "...The official immunity doctrine seeks to reconcile two important considerations--
>
> > '(O)n the one hand, the protection of the individual citizens against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.' Id., at 565" 412 U.S. at 319

The Court went on to state that the doctrine is flexible and applicability of the immunity doctrine to a particular case should depend on "a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweighs the perhaps recurring harm to individual citizens." Id. at 320.

Turning to the facts of the present case, it is undisputed that defendants were plaintiff's supervisors at USATACOM and, as such, were responsible, within their official capacities, to evaluate plaintiff's work performance. It is equally clear that the issuance of the

90-day warning letter, the establishment of the performance rating plan, and the decision to discharge plaintiff for inefficiency were clearly within the outer perimeter of defendants' official duties, and hence satisfying that element of the test for immunity.

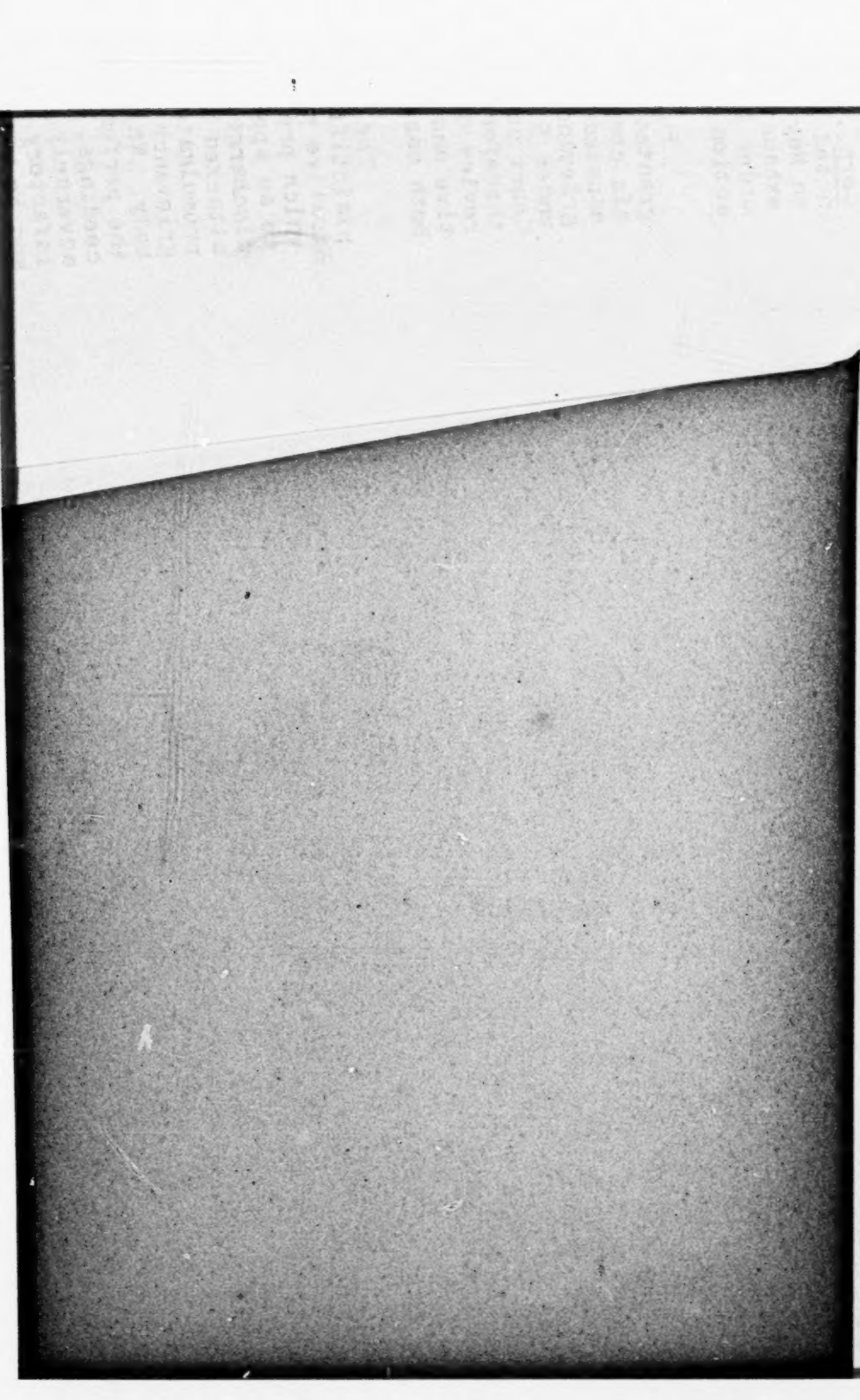
The nature of defendants' positions as supervisors clearly indicates that a major portion of their jobs requires the exercise of discretionary authority. The defendants' affidavits state that their actions were based on their evaluations of plaintiff's performance. Moreover, the Court believes that governmental officials such as these defendants are the type which must be clothed with immunity. The public has a substantial interest in the efficiency of the federal service. To assure attainment of this goal supervisory personnel must be free to exercise discretion in employment related matters without fear of liability from civil damage suits. The public interest in this regard clearly outweighs the interest of government employees whose employment rights are protected against arbitrary actions by statute and by the Civil Service Commission and its regulations. In the present case, if the performance rating plan were issued contrary to law and if plaintiff were indeed wrongfully discharged, he certainly would be able to seek review of the plan and reinstatement with back pay from the Commission. Accordingly, actions for damages against defendants Nouse and Pieklik are barred by the doctrine of official immunity.

With respect to the claims for injunctive and other equitable relief,

which are primarily asserted in Counts Two, Three and Four of the Mandel v. Nouse case, the Court believes that the nature of the relief sought indicates that plaintiff, in effect, seeks relief against the government under the doctrine evolved in Larson v. Foreign and Domestic Corp., 337 U.S. 682 (1949). Therefore, as noted in the opinion of this Court issued on May 17, 1973, plaintiff must show exhaustion of administrative remedies in order to obtain judicial review of agency action under 5 U.S.C. § 704 (1970).

Pursuant to the leave to amend granted by the Court, plaintiff did amend his complaint to allege that he had exhausted administrative remedies by filing grievances, all of which were denied, under 5 C.F.R. § 771.C. However, this Court concludes that plaintiff is not therefore presently entitled to judicial review of the various claims for injunctive and equitable relief brought in both cases.

The basis for this conclusion is that plaintiff's original use of the administrative procedures involved "grievances" which pre-dated his discharge as opposed to an appeal of his allegedly wrongful discharge. For example, plaintiff attacked the performance rating plan promulgated by defendant Nouse and that grievance was denied by the administrative body. While the plaintiff also attacks the performance rating plan in these proceedings, his employment rights were not adversely affected until after the unsatisfactory performance rating was issued and he was discharged. But these actions are matters within the competency and



jurisdiction of the Civil Service Commission. Thus, the denial of the "grievances" were, in reality, preliminary or intermediate agency actions and not "final" actions that would satisfy the exhaustion of remedies doctrine.

An additional basis for denying review at this stage is that plaintiff has filed an appeal from his discharge with the Civil Service Commission. As noted above, the Commission must, in determining whether plaintiff's discharge was proper, review the sufficiency of the performance rating plan, the fairness of defendants' actions, and every other claim which plaintiff makes in these actions. In doing so, the Commission has the power to grant plaintiff essentially all the relief he seeks from this Court. Congress established the Commission with the intent that it would initially review all employee actions within the federal service. It is noteworthy that the Commission has the specific statutory duty to review performance rating plans, such as the one at issue here, under 5 U.S.C. 4306 (1970). Accordingly, the Court holds that the Civil Service Commission has primary jurisdiction over the claims for injunctive or equitable relief presented in the complaint.

The following quotation from United States v. Western Pac. R.R., 352 U.S. 59, 63-64 (1956), provides a good discussion of the doctrine of primary jurisdiction.

> "The doctrine of primary jurisdiction, like the rule requiring exhaustion of admin-

> istrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body, in such case the judicial process is suspended pending referral of such issues to the administrative body for its views." 2/

The Court believes that the Civil Service Commission should have the opportunity to apply its expertise in the complex administrative law issues involved in this case before review is granted by this Court. Plaintiff, of course, may seek judicial review of any final decision by the Civil Service Commission if he so desires. Accordingly, the claims for injunctive or equitable relief must be dismissed for plaintiff's failure to

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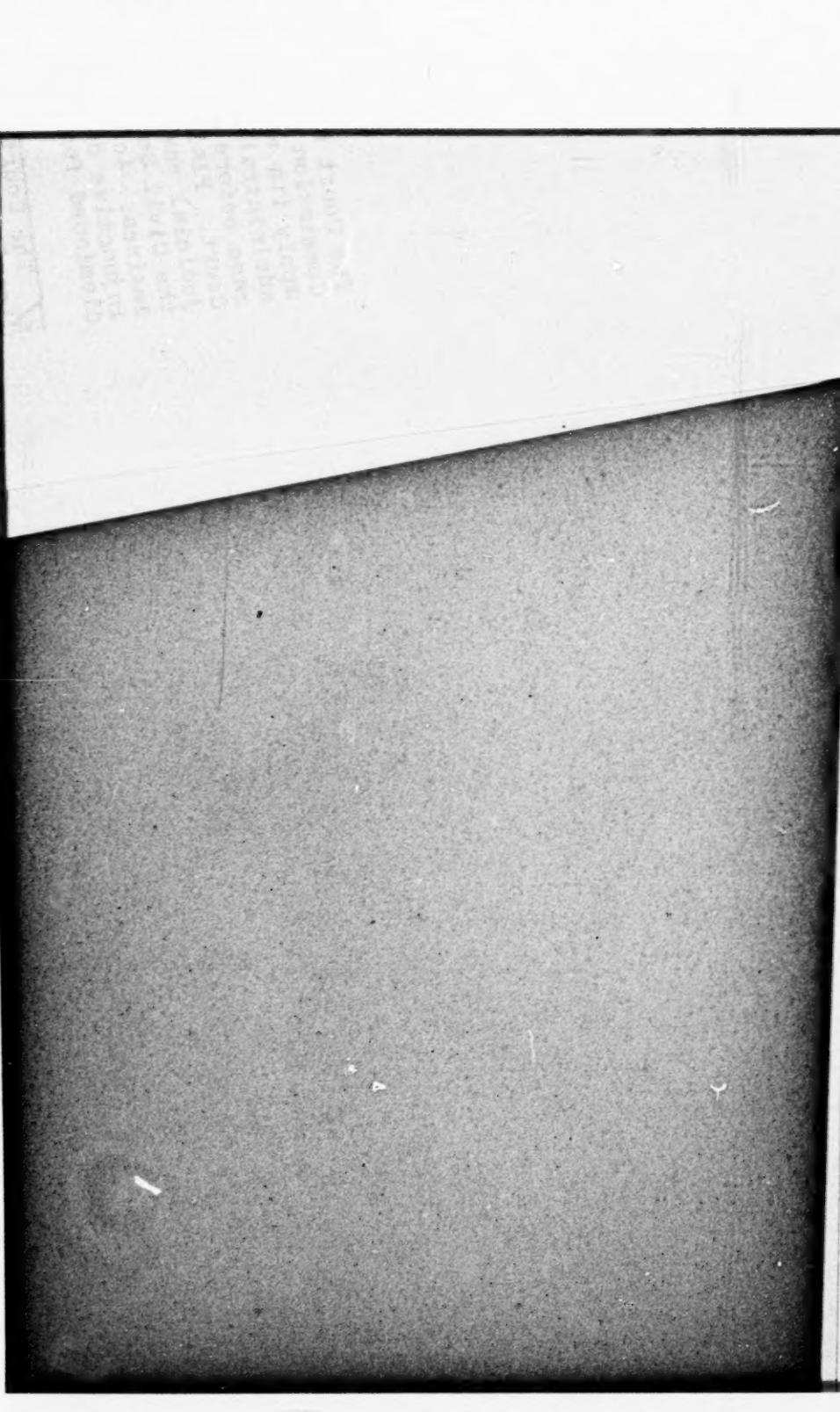
2/ The Court of Appeals for the Sixth Circuit quoted the above passage with approval in Crain v. Blue Grass Stockyards Co., 399 F. 2d 868, 872 (1968).



exhaust administrative remedies.

In summary, defendants' Motions for Summary Judgment are granted on all issues. Plaintiff's pending motions are denied.

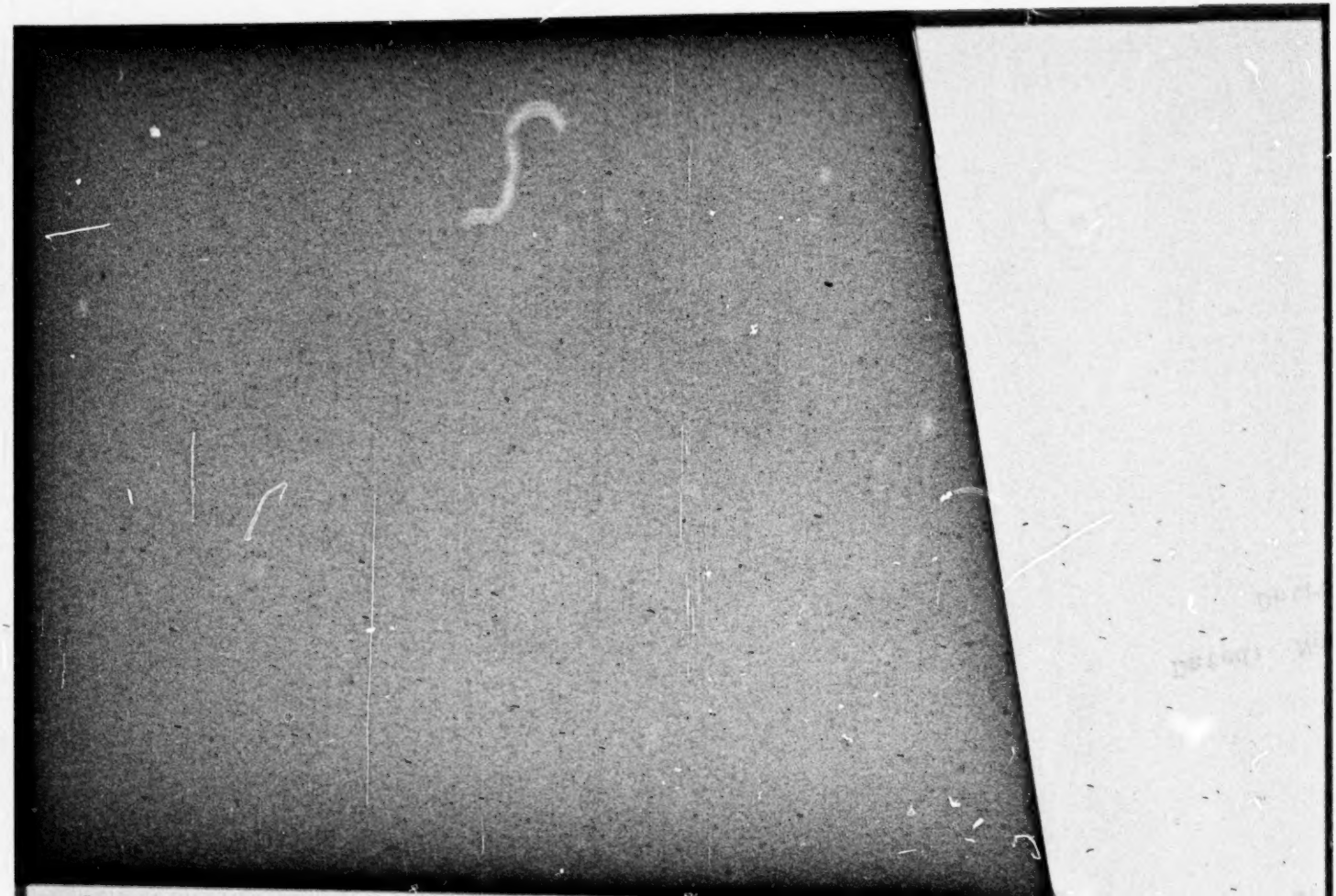
IT IS SO ORDERED.

Philip Pratt

PHILIP PRATT
United States District
Judge

Dated: November 8, 1973.

Detroit, Michigan



EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BARTHOLOMEW MANDEL, Plaintiff, v. JOSEPH O. NOUSE, Defendant.	)	CIVIL ACTION NO. 39861
BARTHOLOMEW MANDEL, Plaintiff, v. JOSEPH E. PIEKLIK, Defendant.	)	CIVIL ACTION NO. 4-70025

filed Nov. 8, 1973

JUDGMENT

These consolidated actions having come on for hearing before the Court on defendants' motions for summary judgment and the issues having been duly heard and a decision having been duly rendered:

IT IS ORDERED AND ADJUDGED that plaintiff's claims for money damages be dismissed on the merits with prejudice, and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's claims for injunctive and other equitable relief be dismissed without prejudice to his bringing a new action after exhaustion of administrative remedies.

Costs to defendant.

Philip Pratt
PHILIP PRATT
United States District Judge

Dated: November 8, 1973
Detroit, Michigan

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BARTHOLOMEW MANDEL, Plaintiff,	)	CIVIL ACTION
v.	)	NO. 4-70025
JOSEPH E. PIEKLIK, Defendant.	)	

filed July 5, 1973

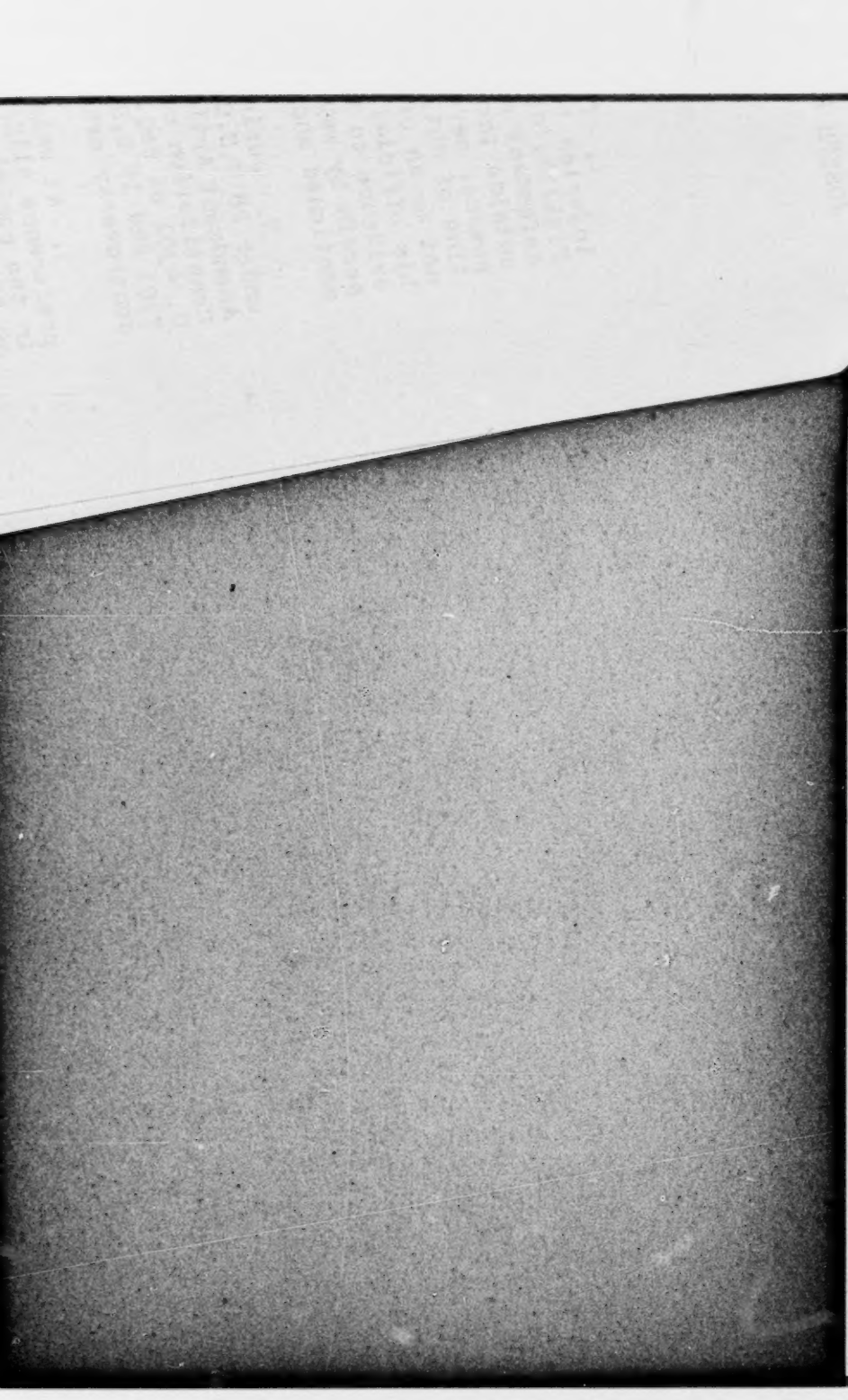
COMPLAINT

COUNT 1

1. This is an action arising from injuries to plaintiff caused by Joseph E. Pieklik, defendant herein, while said defendant was acting unconstitutionally, outside the statutory limitations of his powers, beyond the outer perimeter of his line of duty, hence as an individual and not as an officer of the United States in his official capacity. Prima Facie evidence to this effect is presented herein by way of Exhibits, hereinafter mentioned and attached hereto.

2. Jurisdiction of this Court arises under 28 U.S.C. 1331, 2201, and 2202, Amendment Articles I, V, and XIV of the Constitution of the United States, 5 U.S. C. 4301 et seq., 5101 et seq., 7501 and 7701 and 18 U.S.C. 1505. The amount in controversy exceeds $10,000.

5. At said time, plaintiff was a preference eligible employee, age 54 years, in the position of Mechanical Engineer, GS-830-13, Job No. 13841, in the Systems



Analysis Division, Plans and Analysis Directorate, USATACOM. Plaintiff's supervisory chain of command comprised three officers of USATACOM, viz., Joseph O. Nouse, Orlando Garcia, and defendant, Joseph E. Pieklik, supervisory heads of said division, directorate and command, respectively. USATACOM is a sub-command under United States Army Materiel Command, Department of the Army.

8. At said time, plaintiff was, and for a period of some 32 years prior thereto has been, and still is, engaged in the profession of electrical or mechanical engineering in grade levels ranging from apprentice to senior engineer, during which time Plaintiff enjoyed not only the confidence of his official superiors (barring said officers of USATACOM), but the esteem and respect of all who knew him and of the community in general. Plaintiff was since 1960 and still is, a Registered Professional Engineer, Certificate No. 11716, duly authorized by the Board of Registration to practise Mechanical Engineering in the State of Michigan.

10. Amendment Article V of the Constitution of the United States sets forth plaintiff's rights to due process prior to being deprived of any interest in "liberty" or "property."

11. By reason of his status at said time, as a preference eligible employee of the Federal Service, plaintiff enjoyed tenure rights and hence had a "property" interest in continued employment in the Federal Service.

18. By reason of the cause for discharge,viz., inefficiency, a stigma has been cast by defendant on plaintiff's good name, fame and reputation so as to foreclose his freedom, or liberty, to take advantage of other employment opportunities. Hence, plaintiff was deprived of a liberty without prior hearing on the matter.

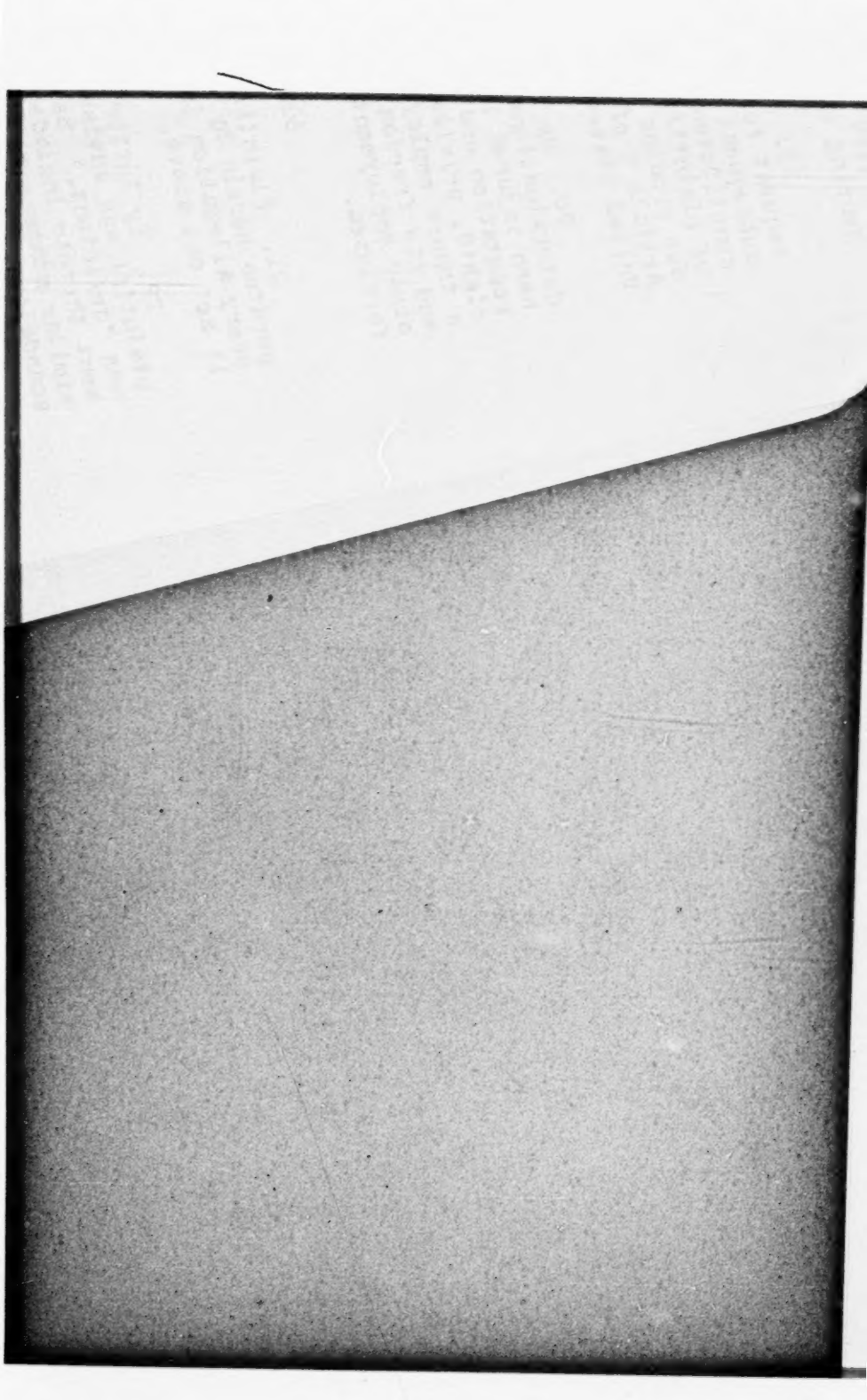
19. Said denial of plaintiff's request for administrative relief and the subsequent removal proceeding by defendant constituted a violation and infringement of plaintiff's constitutional rights to due process of law under Amendment Article V of the Constitution of the United States.

20. By reason of defendant's determinations and action, plaintiff has been injured in his good name, fame and reputation and suffered losses in his rights, privileges, property and salary as a tenure employee of the Federal Service and his freedom to take advantage of other employment opportunities was forclosed.

COUNT II

21. Plaintiff realleges and incorporates herein by reference each and every allegation in Paragraphs I through 11 set out above.

22. By letter of October 30, 1972, plaintiff was advised that his performance was "deficient." Said letter and attachment thereto includes numerous other similar statements that are false, scandalous, illegal and defamatory. On



the whole, said letter constitutes malicious writing and libel. (See Civil Action No. 39861 now pending in this Court.) A copy of said letter is set forth as Exhibit N attached hereto.

23. Said Joseph O. Nouse, signer of said letter, contends that the defamatory statements are a performance appraisal effected by a performance rating plan.

24. By memorandum of January 30, 1973, plaintiff was advised by Joseph O. Nouse, by implication, that he had failed to demonstrate satisfactory performance after being afforded 90 days to do so. This appraisal was also based on said performance rating plan.

25. By letter of March 22, 1973, plaintiff was given notice by Joseph O. Nouse, purportedly acting in his official capacity, of a proposed adverse action to separate plaintiff from theFederal Service for inefficiency based on an appraisal made under said performance rating plan. Plaintiff replied to said letter, within the time allotted him by USATACOM, by letter of April 19, 1973. (Exhibit B).

26. By letter of May 9, 1973, plaintiff was advised that, after full consideration of the charge of inefficiency, as based on the appraisal made under said performance rating plan, and plaintiff's reply thereto (Exhibit B), it was the decision of defendant, purportedly acting in his official capacity, tnat plaintiff be separated from the Federal Service for inefficiency, effective May 23, 1973. Said letter of May 9,

1973, is set forth in Exhibit E.

27. Plaintiff was in fact separated from the Federal Service on May 23, 1973.

28. Said performance rating plan comprises:

a. Non-existent performance requirements prior to April 21, 1972.

b. Performance requirements as established by Joseph O. Nouse on April 21, 1972, copy of which is attached hereto as Exhibit G (These requirements are also set forth in attachment to October 30, 1972, letter, Exhibit N).

c. Performance appraisal and rating is determined by Joseph O. Nouse by comparing employee's performance with the performance requirements (also referred to as job standards).

29. The limitations, duties and authority of said officers of USATACOM, relative to employee performance rating plans, are set forth in 5 U.S.C. 4301 et seq., Regulation CPR 400 (CH 3) 430.3 and USATACOM Regulation 600-5, Chapter 16.

30. Performance rating plans are required by 5 U.S.C. 4302 to be established "for the purpose of recognizing the merits of employees and their contributions to efficiency and economy in the Federal Service."

31. Statute 5 U.S.C. 4303 sets forth required due process relative to an employee's performance appraisal, to the end

that his "merits" and "contributions", supra, may be recognized. Said due process assures him of a fair appraisal in relation to requirements "made known" to him.

32. Statute 5 U.S.C. 4303 provides protection to all employees in that it offers them a means of defending themselves against unfair appraisals and charges of inefficiency.

33. Amendment Articles V and XIV of the Constitution of the United States set forth plaintiff's rights to due process and equal protection of the laws.

34. In ousting plaintiff from his position, defendant violated, obstructed and denied plaintiff's rights to due process and equal protection of the laws as manifested by the following acts and determinations of defendant and those of his subordinate officers, condoned and approved by defendant, to wit:

35. The determinations and actions of defendant set out above in Paragraph 34 constituted a violation of statutory law and were effected unconstitutionally in that they deprived plaintiff of his constitutional rights to due process and equal protection of the laws under Amendment Articles V and XIV of the Constitution of the United States.

36. By reason of defendant's determinations and actions, supra, plaintiff has been irreparably injured in his good name, fame and reputation and has been so stigmatized by the nature of the charges and the cause of discharge, viz., inefficiency, that his freedom, or

liberty, to take advantage of other employment opportunities has been foreclosed. Further, plaintiff has suffered losses in his rights, privileges, property, and salary as a tenure employee of the Federal Service.

COUNT III

37. Plaintiff realleges and incorporates herein by reference each and every allegation in Paragraphs 1 through 11 and 22 through 33 set out above.

38. The limitations, duties and authority of the officers of Department of the Army, relative to the issuance of performance ratings and review of such ratings are set forth in 5 U.S.C. 4303 (5) and 4305, Civilian Personnel Regulations and USATACOM Regulation 600-5, Chapter 16.

39. Statute 5 U.S.C. 4303 (5) sets forth the last step in required due process under the performance rating plan, viz., "that each employee be kept currently advised of his performance and promptly notified of his performance rating." A current rating and the right to a review thereof under 5 U.S.C. 4305 constitutes an employee's only effective means of defending himself against unfair appraisals and charges of inefficiency.

40. Defendant violated, obstructed and denied plaintiff's rights to due process and equal protection under said statutes and regulations as manifested by the following acts and determinations of defendant and those of his subordinate

officers, condoned and approved by defendant, to wit:

41. The determinations and actions of defendant as set out in Paragraph 40 above constituted a violation of statutory law and were effected unconstitutionally in that they deprived plaintiff of his constitutional rights to due process and equal protection of the laws under Amendment Articles V and XIV of the Constitution of the United States.

42. By reason of defendant's determinations and actions, supra, plaintiff has been irreparably injured in his good name, fame and reputation and has been so stigmatized by the nature of the charges and the cause of discharge, viz., inefficiency, that his freedom, or liberty, to take advantage of other employment opportunities has been foreclosed. Further, plaintiff has suffered losses in his rights, privileges, property, and salary as a tenure employee of the Federal Service.

COUNT 1V

43. Plaintiff realleges and incorporates herein by reference each and every allegation in Paragraphs 1 through 11, 22 through 33 and 38 and 39 set out above.

44. Amendment Article 1 of the Constitution of the United States sets forth plaintiff's right to freedom of apeech.

45. Statute 18 U.S.C. 1505 sets forth the rights of a party or witness in a

proceeding pending before any department of the United States.

46. Said rating plan as established, interpreted and administered by Joseph O. Nouse as condoned and approved by defendant, infringes on plaintiff rights referenced in Paragraphs 44 and 45 set out above, to wit:

47. The determinations and actions of defendant as set out in Paragraph 46 above constituted a violation of statutory law and were effected unconstitutionally.

48. By reason of defendant's determinations and actions, supra, plaintiff has been irreparably injured in his good name, fame and reputation and has been so stigmatized by the nature of the charges and cause of discharge, viz., inefficiency, that his freedom, or liberty, to take advantage of other employment opportunities has been foreclosed. Further, plaintiff has suffered losses in his rights, privileges, property and salary as a tenure employee of the Federal Service.

COUNT V

49. Plaintiff realleges and incorporates herein by reference each and every allegation in Paragraphs 1 through 11, 22 through 33, 38, 39, 44 and 45 set out above.

50. The Performance Rating Statutes, 5 U.S.C. 4301 et seq., presume that the supervisor who assigns work, guides and appraises an employee's performance is qualified under the Classification and

Qualification Standards established for his position by the Civil Service Commission, pursuant to 5 U.S.C. 5101 et seq. It is therefore the statutory duty of USATACOM officers to appoint, condone, approve or support only such subordinate officers as fulfill the requirements established for their positions.

51. The Classification Statutes, 5 U.S.C. 5101 et seq., thus provide protection to an employee against unfair appraisals and charges of inefficiency rendered by unqualified and incompetent supervisors.

52. Defendant violated, obstructed and denied plaintiff's rights to due process and equal protection of the laws, under the Performance Rating and Classification Statutes, as manifested by the following acts and determinations of defendant:

53. The determinations and actions of defendant set out above in Paragraph 52 constituted a violation of statutory law and were effected unconstitutionally in that they deprived plaintiff of his constitutional rights to due process and equal protection of the laws.

54. By reason of defendant's determinations and actions, supra, plaintiff has been irreparably injured in his good name, fame, and reputation and has been so stigmatized by the nature of the charges and the cause of discharge, viz., inefficiency, that his freedom, or liberty, to take advantage of other employment opportunities has been foreclosed. Further, plaintiff has suffered

losses in his rights, privileges, property and salary as a tenure employee of the Federal Service.

COUNT VI

55. Plaintiff realleges and incorporates herein by reference each and every allegation in Paragraphs 1 through 11, 22 through 33, 38, 39, 44, 45, 50, and 51.

56. The letter of October 30, 1972 (Exhibit N) was written by Joseph O. Nouse and is patently addressed to plaintiff and patently makes reference to the performance of the plaintiff as a mechanical engineer in said Systems Analysis Division of USATACOM.

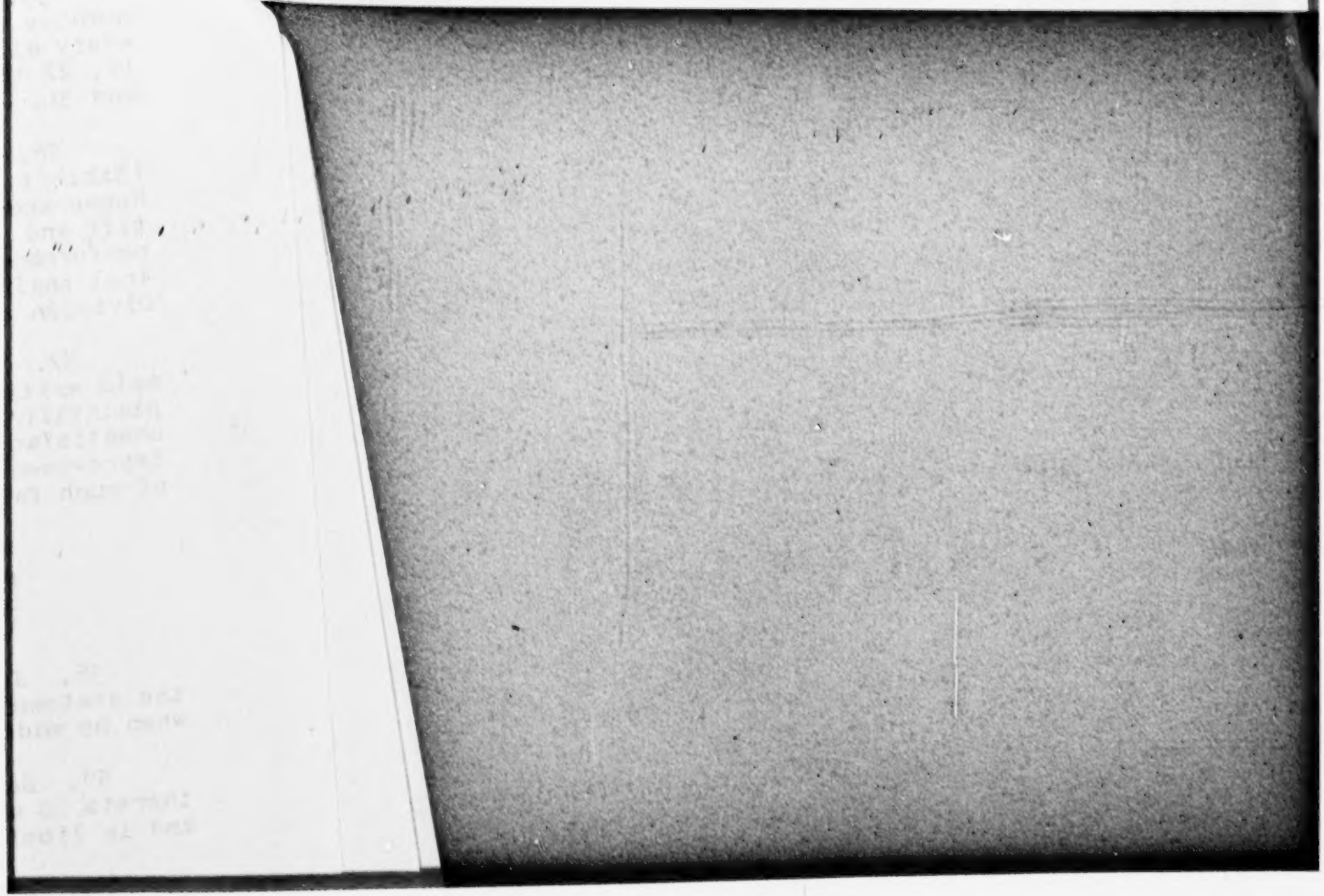
57. The defamatory statements in said writing having reference to plaintiff's deficient, inefficient and unsatisfactory performance, need for improvement, etc., are false. An example of such false, libelous statements is:

> "This is to inform you that your performance as a Mechanical Engineer, GS-830-13, Job No. 13841, is deficient."

58. Joseph O. Nouse well knew that the statements and charges were untrue when he made them.

59. Said letter and attachment thereto is a false and malicious libel and is libelous per se.

60. Plaintiff requested that Joseph O. Nouse retract said writing. Joseph O.

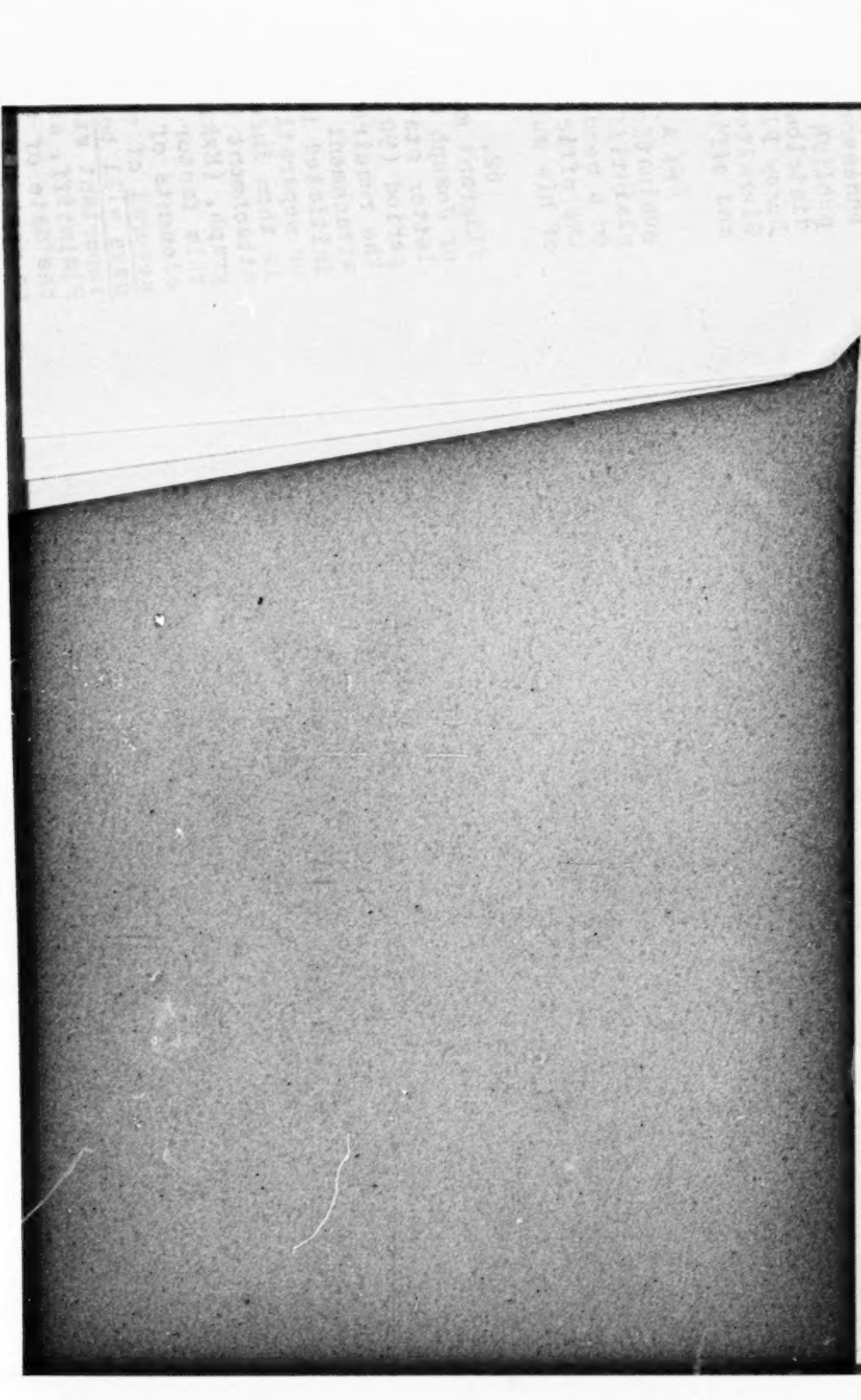


ouse has to date failed to accede to this request.

61. Joseph O. Nouse, maliciously and wantonly intending to injure plaintiff and plaintiff's reputation, achieved by 32 years of honest and competent endeavor, did wilfully and deliberately publish said letter and attachment by distributing same or copies thereof to Leroy Pletten, Joan E. Maniere, Viola A. Gieraltowski, and diverse other employees and officials at USATACOM.

61 A. Publication of the performance evaluation appraisals or ratings of plaintiff, or any other employee, except on a need-to-know basis, was not part of the official duties of defendant or any of his subordinate officers.

62. To further show the patently flagrant malice, wickedness and intent of Joseph O. Nouse: Paragraph 6 of said letter states, "If at the end of the period (90 days), you have failed to meet the requirements spelled out in the attachment to this letter, action will be initiated for your reassignment, demotion, or separation--inefficiency." Plaintiff is then informed on page A6 of said attachment (right column, bottom paragraph, (Exhibit N) that "improvement in this factor is directly related to other elements of this evaluation. As with <u>several</u> of the problems, <u>more than 90 days will be required,</u> but the most important step is the first one." Plaintiff, as prejudged by J.O. Nouse on the date of the writing, has already failed to meet the requirements! (Underlining added)



63. By reason of the writing, publishing and distribution of said false, malicious and defamatory letter and attachment, plaintiff has been irreparably injured in his good name, fame and reputation and has been so stigmatized by the nature of the writing that his freedom, or liberty, to take advantage of other employment opportunities has been foreclosed.

64. Well knowing the premises, defendant, Joseph E. Pieklik wilfully, deliberately and maliciously condoned, approved and supported said false, malicious and defamatory writing as manifested by the following determinations and actions effected, condoned, approved or supported by defendant, to wit:

65. The determinations and actions of defendant set out above in Paragraph 64 constituted a false, malicious, defamation of the good name, fame and reputation of plaintiff, effected unconstitutionally and in violation of statutory law.

66. By reason of defendant's determinations and actions, supra, plaintiff has been irreparably injured in his good name, fame and reputation and has been so stigmatized by the nature of the charges and the cause of discharge, viz., inefficiency, that his freedom, or liberty, to take advantage of other employment opportunities has been foreclosed. Further, plaintiff has suffered losses in his rights, privileges, property and salary as a tenure employee of the Federal Service.

ALL COUNTS

WHEREFORE, as to each and every Count set out above, plaintiff respectfully prays for the following relief:

A. That plaintiff recover general or compensatory damages from defendant in the sum of $200,000 (but not exceeding $200,000 for all counts);

B. That plaintiff recover punitive or exemplary damages from defendant in the sum of $200,000 (but not exceeding $200,000 for all counts);

C. That plaintiff recover from defendant his costs herein, including attorney fees, or the equivalent thereof for plaintiff's personal time and effort;

D. That defendant, as an individual, be ordered by this Court to publish, in adequate measure, a complete explanation, including the opinion and order of this Court in pertinent part, of the wrongful discharge of plaintiff and an appropriate apology for defendant's wrongful and unconstitutional determinations and actions in the matter;

E. That a judicial declaration be made by this Court as to the rights of plaintiff;

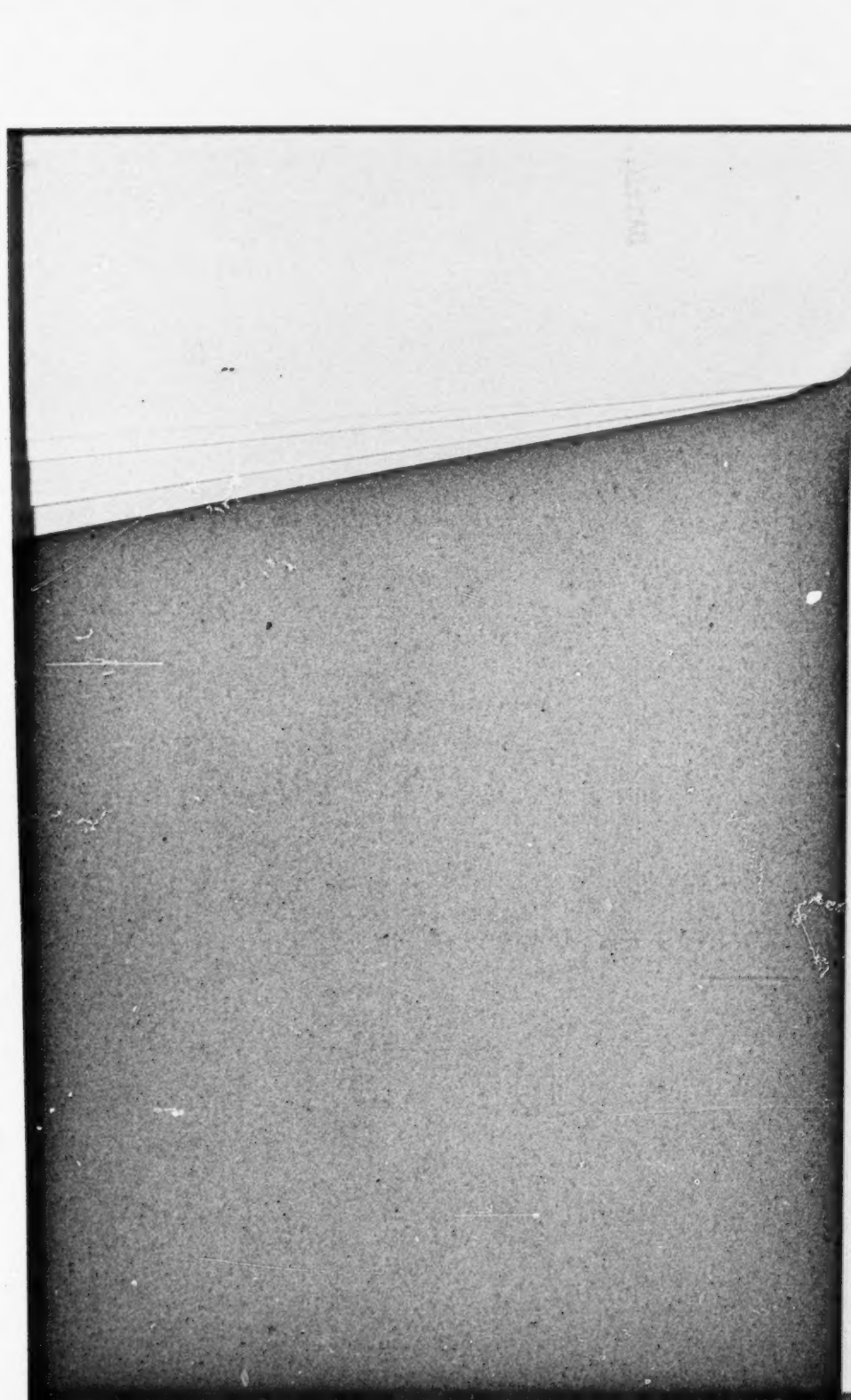
F. For such other, further and different relief as to the Court may seem just and proper.

Bartholomew Mandel

BARTHOLOMEW MANDEL
Plaintiff
5575 Woodland Pass
Birmingham, Michigan
48010

Telephone:
626-1413 (Residence)

DATED: July 5, 1973



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HARRY THOMAS, Plaintiff,	)	CIVIL ACTION
v.	)	NO. 40287
HOWARD H. CALLAWAY, Secretary of the Army, Department of the Army, Defendant.	)	

Filed Aug 15, 1973

AMENDED COMPLAINT

COUNT I

1. This is an action arising from an infringement of rights of free speech, due process and equal protection of the laws by an agency of the United States under the Performance Rating Statutes and an employee discharge proceeding.

2. Jurisdiction of this Court arises under 28 U.S.C. 1346(a)(2), 1361, 2201 and 2202, 5 U.S.C. 4301 et seq., 5101 et seq., 5596 and 7501, 18 U.S.C. 1505, Ex. Ord. No. 11491, Sec. 22, October 29, 1969, F.R. 17605, and Amendment Articles I, V and XIV of the Constitution of the United States. The amount in controversy is under $10,000.

3. The wrongs hereinafter mentioned were committed by defendant at the Department of the Army installation known as United States Army Tank-Automotive Command (hereinafter "USATACOM") in the city of Warren, County of Macomb, State of Michigan.

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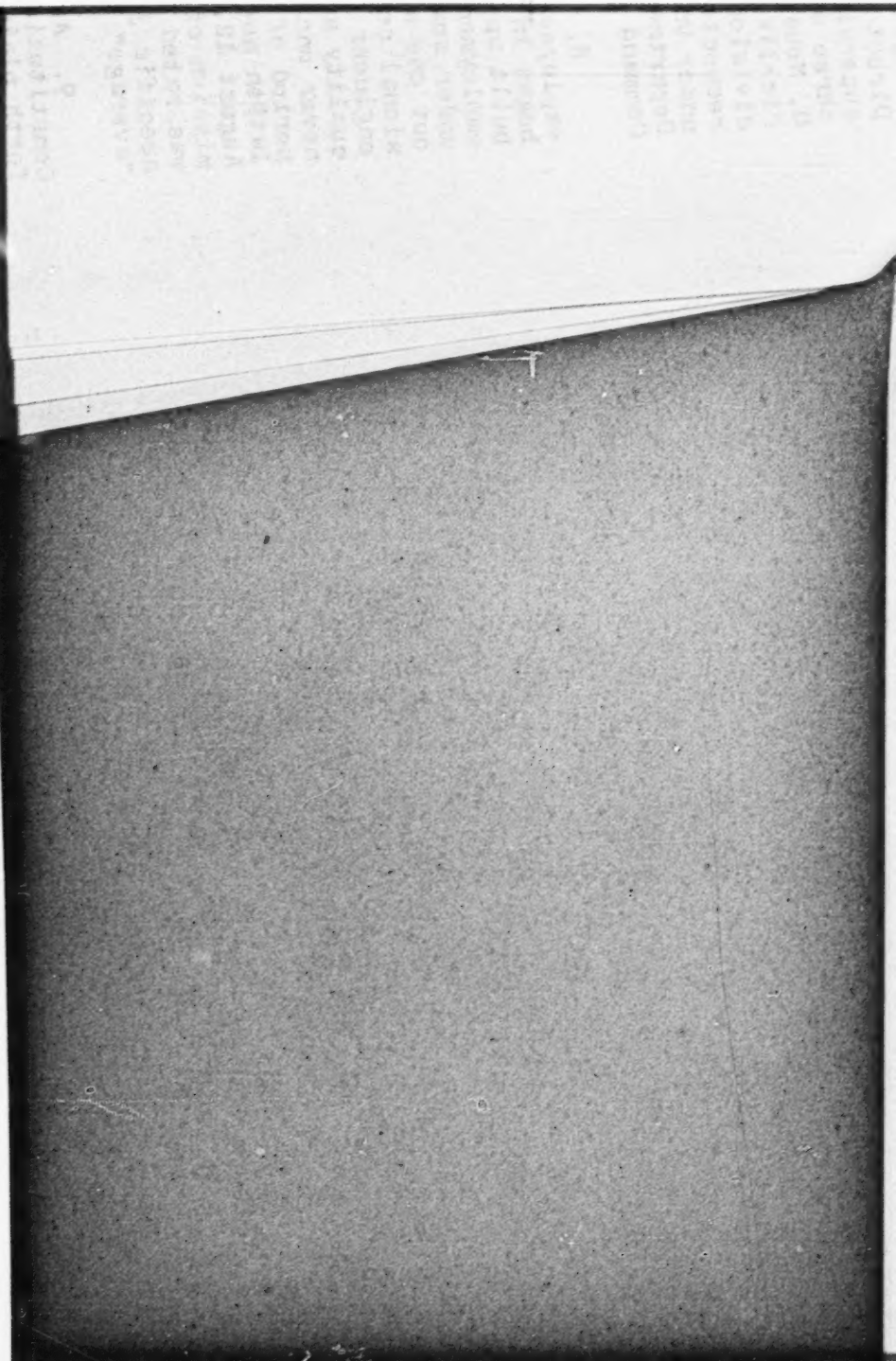
4. At the time of the commission of said wrongs, plaintiff was a non-probationary Federal employee in competitive service; age 55 years, in the position of Mechanical Engineer, GS-830-13, Job No. 13405, in the Systems Analysis Division, Plans and Analysis Directorate, USATACOM. Plaintiff's supervisory chain of command comprised three officers of USATACOM, viz., Joseph O. Nouse, Orlando Garcia, Joseph E. Pieklik, supervisory heads of said division, directorate and command, respectively. USATACOM is a sub-command under United States Army Materiel Command, Department of the Army. The Army Materiel Command is headed by H.A. Miley, Jr.

8. Prior to plaintiff's present employee-supervisor relationship, which began in October 1972, plaintiff had built up a record of some 35 years of employment at five different organizations under some 14 different supervisors without one slur being cast on his professional conduct and performance as an engineer or employee. The general overall quality and quantity of his work was never once impugned. During the entire period of his employment at the installation now known as USATACOM, viz., from August 12, 1957 to the time of the commission of said wrongs, his job performance was rated "satisfactory." Ratings for specific job elements ranged between "average" to "outstanding."

9. Amendment Article V of the Constitution of the United States sets forth plaintiff's rights to due process prior to being deprived of any interest in "liberty" or "property."



10. By reason of his status at said time, as non-probationary Federal employee in competitive service, plaintiff enjoyed tenure rights and hence had a "property" interest in continued employment in the Federal Service.

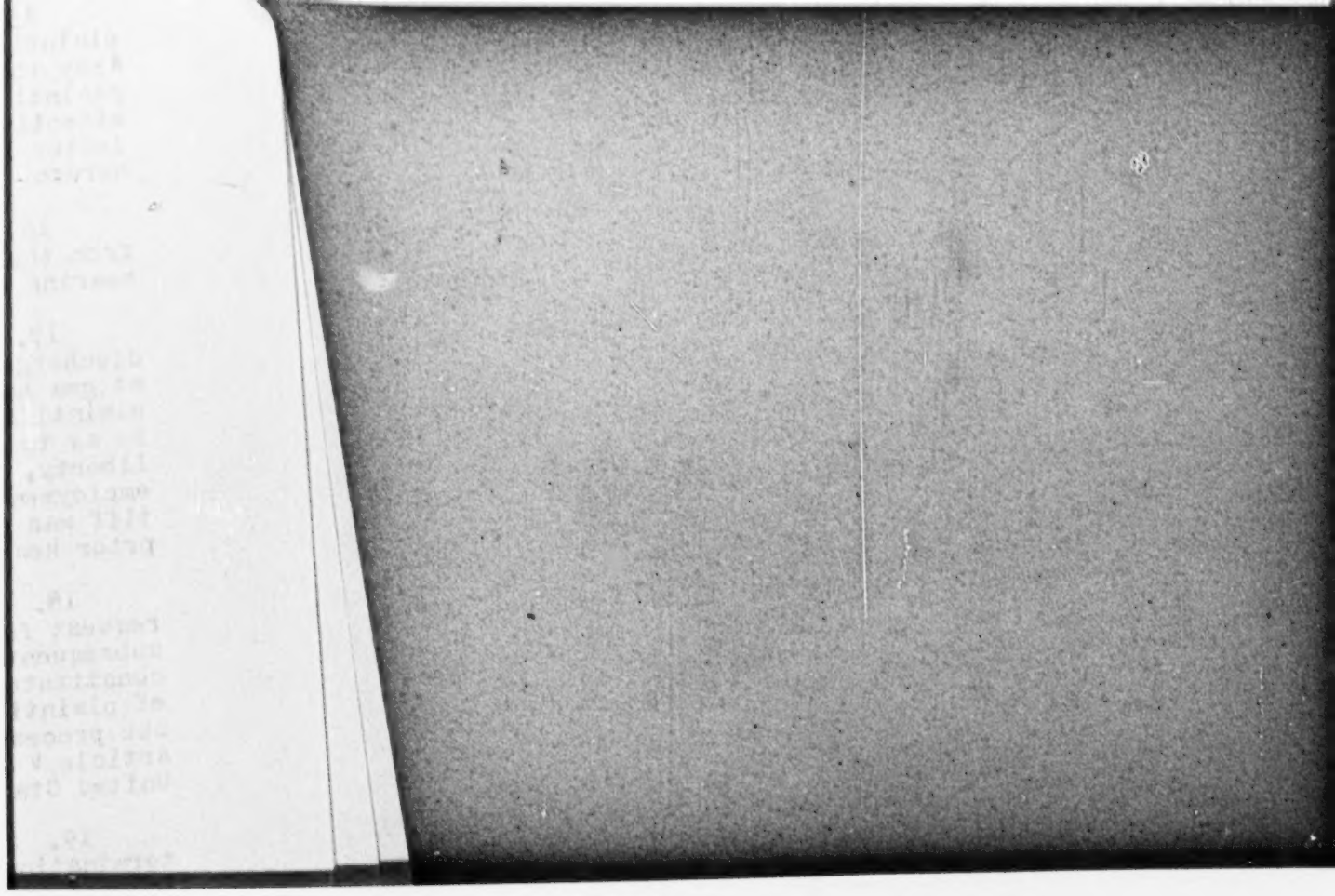
15. By letter of July 17, 1973, plaintiff was advised by Department of the Army that it was its decision that plaintiff be separated for inefficiency effective July 20, 1973. A copy of said letter is set forth as Exhibit W attached hereto.

16. Plaintiff was in fact separated from the Federal Service without prior hearing on July 20, 1973.

17. By reason of the cause for discharge, viz., inefficiency, etc., a stigma has been cast by defendant on plaintiff's good name, fame and reputation so as to foreclose his freedom, or liberty, to take advantage of other employment opportunities. Hence, plaintiff was deprived of a liberty without prior hearing on the matter.

18. Said denial of plaintiff's request for administrative relief and the subsequent removal proceeding by defendant constituted a violation and infringement of plaintiff's constitutional rights to due process of law under Amendment Article V of the Constitution of the United States.

19. By reason of defendant's determinations and action, plaintiff has been injured in his good name, fame and reputation and suffered losses in his



rights, privileges, property and salary as a tenure employee of the Federal Service and his freedom to take advantage of other employment opportunities was foreclosed.

COUNT II

20. Plaintiff realleges and incorporates herein by reference each and every allegation in Paragraphs 1 through 10 set out above.

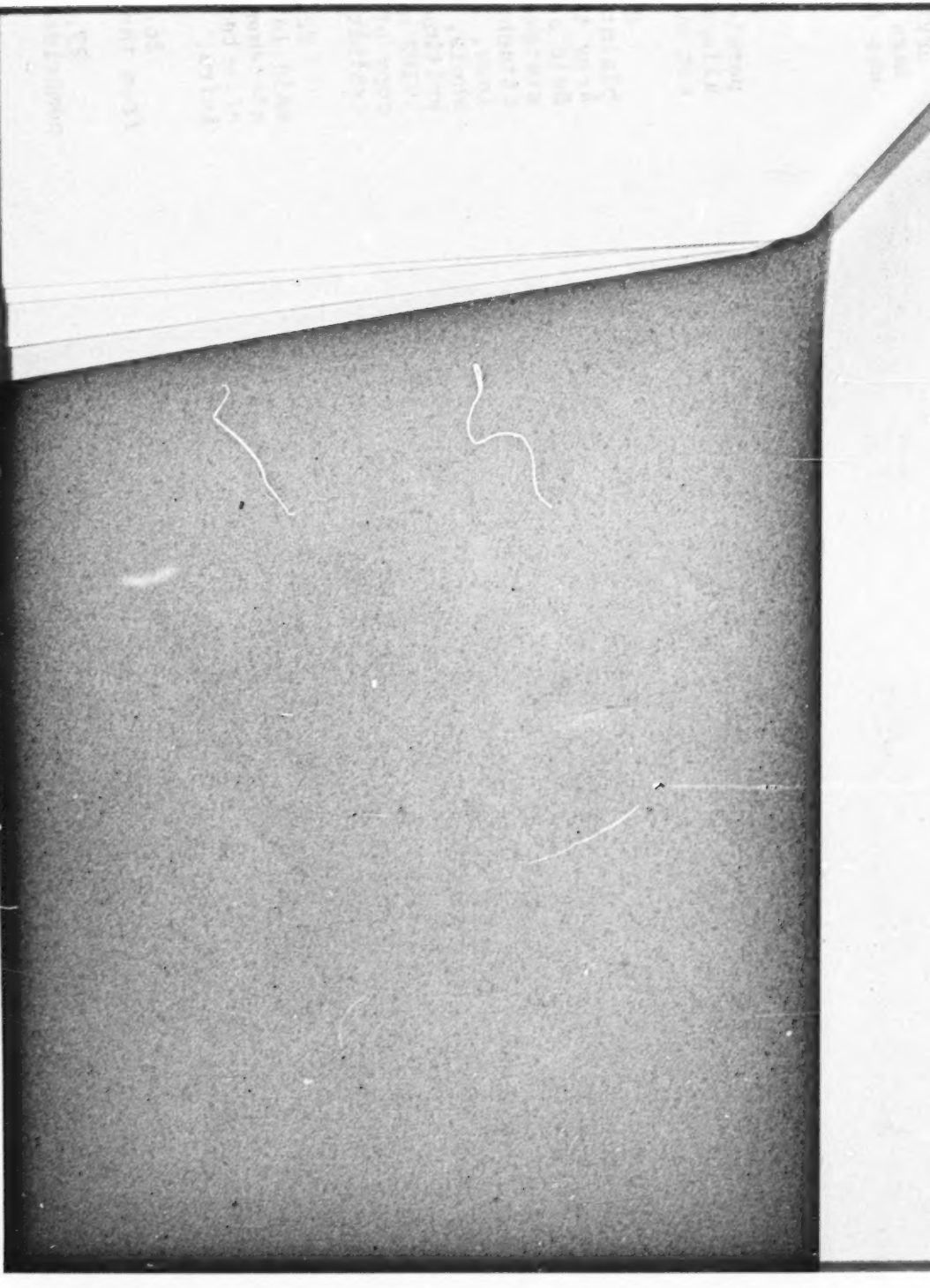
21. By letter of October 30, 1973, plaintiff was advised by Department of the Army that his performance was "deficient". Said advice and numerous other similar statements contained in said letter and attachment thereto are false, scandalous, illegal and defamatory. On the whole, said letter constitutes mailicious writing and libel. (See Civil Action No. 39182 now pending in this Court.) A copy of said letter is set forth as Exhibit A attached hereto.

22. Said Joseph O. Nouse, signer of said letter, contends that the defamatory statements are a performance appraisal effected by a performance rating plan, infra.

26. Plaintiff was in fact separated from the Federal Service on July 20, 1973.

27. Said performance rating plan comprises:

a. Non-existent performance requirements prior to April 21, 1972.



b. Performance requirements as established by Joseph O. Nouse on April 21, 1972, copy of which is attached hereto as Exhibit C (These requirements are also set forth in attachment to October 30, 1972, letter, Exhibit A).

c. Performance appraisal and rating is determined by Joseph O. Nouse by comparing employee's performance with the performance requirements (also referred to as job standards).

28. The limitations, duties and authority of said officers of USATACOM, relative to employee performance rating plans, are set forth in 5 U.S.C. 4301 et seq., Regulation CPR 400 (CH 3) 430.3, and USATACOM Regulation 600-5, Chapter 16.

29. Performance rating plans are required by 5 U.S.C. 4302 to be established "for the purpose of recognizing the metits of employees and their contributions to efficiency and economy in the Federal Service."

30. Statute 5 U.S.C. 4303 sets forth required due process relative to an employee's performance appraisal, to the end that his "merits" and "contributions," supra, may be recognized. Said due process assures him of a fair appraisal in relation to requirements "made known" to him.

31. Statute 5 U.S.C. 4303 provides protection to all employees in that it offers them a means of defending themselves against unfair appraisals and

charges of inefficiency.

32. Amendment Articles V and XIV of the Constitution of the United States set forth plaintiff's rights to due process and equal protection of the laws.

33. In ousting plaintiff from his position, defendant Department of the Army violated, obstructed and denied plaintiff's constitutional rights to due process and equal protection of the laws as manifested by the following acts and determinations of its officers, condoned and approved by defendant, to wit:

34. The determinations and actions of defendant set out above in Paragraph 33 constituted a violation of statutory law and were effected unconstitutionally in that they deprived plaintiff of his rights to due process and equal protection of the laws under Amendment Articles V and XIV of the Constitution of the United States.

35. By reason of defendant's determinations and actions, supra, plaintiff has been irreparably injured in his good name, fame and reputation and has been so stigmatized by the nature of the charges that his freedom to take advantage of other employment opportunities has been materially foreclosed. Further, plaintiff has suffered losses in his rights, privileges, property, and salary as a tenure employee of the Federal Service.

36. Plaintiff has exhausted all administrative remedies, as alleged in

Paragraph 33-i above, and has no other adequate remedy at law.

COUNT III

37. Plaintiff realleges and incorporates herein by reference each and every allegation in Paragraphs 1 through 10 and 21 through 32 set out above.

38. The limitations, duties and authority of the officers of USATACOM, relative to the issuance of performance ratings and review thereof are set forth in 5 U.S.C. 4303(5) and 4305, Civilian Personnel Regulations, and USATACOM Regulation 600-5, Chapter 16.

39. Statute 5 U.S.C. 4303(5) sets forth the last step in required due process under the performance rating plan, viz., "that each employee be kept currently advised of his performance and promptly notified of his performance rating." A current rating and the right to a review thereof under 5 U.S.C. 4305 constitutes an employee's only effective means of defending himself against unfair appraisals and charges of inefficiency.

40. Defendant Department of the Army violated, obstructed and denied plaintiff's rights to due process and equal protection under said statutes and regulations as manifested by the following acts and determinations of its officers, condoned and approved by defendant, to wit:

41. The determinations and actions of defendant as set out above in

Paragraph 27 constituted a violation of statutory law and were effected unconstitutionally in that they deprived plaintiff of his rights to due process and equal protection of the laws under Amendment Articles V and XIV of the Constitution of the United States.

42. By reason of defendant's determinations and actions, supra, plaintiff has been irreparably injured in his good name, fame and reputation and has been so stigmatized by the nature of the charges that his freedom to take advantage of other employment opportunities has been foreclosed. Further, plaintiff has suffered losses in his rights, privileges, property and salary as a tenure employee of the Federal Service.

43. Plaintiff has exhausted all administrative remedies, as alleged in Paragraph 40-a, b, c, d set out above, and has no other remedy at law.

COUNT IV

44. Plaintiff realleges and incorporates herein by reference each and every allegation in Paragraphs 1 through 10, 21 through 32, 38 and 39 set out above.

45. Amendment Article I of the Constitution of the United States sets forth plaintiff's right to freedom of speech.

46. Amendment Article V of the Constitution of the United States sets

forth plaintiff's right to due process prior to being deprived of any liberty.

47. Statute 18 U.S.C. 1505 sets forth the rights of a party or witness in a proceeding pending before any department of the United States.

48. Said rating plan as established, interpreted and administered by Joseph O. Nouse infringes on plaintiff's rights referenced in Paragraphs 45 through 47 set out above, to wit:

49. By reason of defendant's determinations and actions, supra, plaintiff has been irreparably injured in his good name, fame and reputation and has been so stigmatized by the nature of the charges and the cause of discharge, viz., inefficiency, etc., that his freedom, or liberty, to take advantage of other employment opportunities has been foreclosed. Further, plaintiff has suffered losses in his rights, privileges, property and salary as a tenure employee of the Federal Service.

50. By virtue of the relief sought by letters, memorandums and grievances, as alleged in Paragraphs 33-i and 40-a,b,c,d set out above, plaintiff has exhausted all administrative remedies and has no other adequate remedy at law.

COUNT V

51. Plaintiff realleges and incorporates herein by reference each and every allegation in Paragraphs 1 through 10, 21 through 32, 38 and 39 set out above.

52. The Performance Rating Statutes, 5 U.S.C. 4301 et seq., presume that the supervisor who assigns work, guides and appraises an employee's performance is qualified under the Classification and Qualification Standards established for his positionby the Civil Service Commission, pursuant to 5 U.S.C. 5101 et seq. It is therefore the statutory duty of USATACOM officers to appoint, condone, approve or support only such subordinate officers as fulfill the requirements established for their positions.

53. The Classification Statutes, 5 U.S.C. 5101 et seq., thus provide protection to an employee against unfair appraisals and charges of inefficiency rendered by unqualified and incompetent supervisors.

54. Department of the Army violated, obstructed and denied plaintiff's rights to due process and equal protection of the laws, under the Performance Rating and Classification Statutes, as manifested by the following acts and determinations of its officers.

55. The determinations and actions of defendant set out above in Paragraph 54 constituted a violation of statutory law and were effected unconstitutionally in that they deprived plaintiff of his constitutional rights to due process and equal protection of the laws.

56. By reason of defendant's determinations and actions, supra, plaintiff has been irreparably injured in his good name, fame, and reputation and has been so stigmatized by the nature of

the charges and the cause of discharge, viz., inefficiency, etc., that his freedom, or liberty, to take advantage of other employment opportunities has been foreclosed. Further, plaintiff has suffered losses in his rights, privileges, property and salary as a tenure employee of the Federal Service.

COUNT VI

57. Plaintiff realleges and incorporates herein by reference each and every allegation in Paragraphs 1 through 10, 21 through 32.

58. Said Joseph O. Nouse administered his performance rating plan in a discriminatory and illegal manner, to wit:

59. Plaintiff has exhausted all administrative remedies and has no other adequate remedy at law.

60. The determinations and actions of defendant set out above in Paragraph 58 constituted a violation of statutory law and were effected unconstitutionally in that they deprived plaintiff of his constitutional rights to due process and equal protection of the laws.

61. By reason of defendant's determinations and actions, supra, plaintiff has been irreparably injured in his good name, fame and reputation and has been so stigmatized by the nature of the charges and the cause of discharge, viz., inefficiency, etc., that his freedom, or liberty, to take advantage of other

employment opportunities has been foreclosed. Further, plaintiff has suffered losses in his rights, privileges, property and salary as a tenure employee of the Federal Service.

* * *

The prayers for relief under the various Counts, supra, request declaratory, injunctive and compensatory relief for money damages to the effect that petitioner be reinstated to his quondom position with back pay that his rights under 5 U.S.C. 4301 et seq. and 5101 et seq., Constitutional Amendments I, V, and XIV be established and observed by the Agency, including taxation for costs.

HARRY THOMAS,
Plaintiff
65151 Wolcott Road
Romeo, Michigan
48065
752-3118

DATED: August 11, 1973

E12

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1259

BARTHOLOMEW MANDEL AND HARRY THOMAS, PETITIONERS

v.

JOSEPH O. NOUSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. In these cases, consolidated on appeal, petitioners individually brought actions against various Army officials alleged to have libeled them, to have discharged them from government employment according to an illegal employee performance rating plan, and unlawfully to have denied them a pre-termination hearing. Damages and injunctive and declaratory relief were asked. The two district courts granted defendants summary judgment on the libel claim, finding them clothed with official immunity, and dismissed the equitable claims on the grounds that petitioners had failed to exhaust administrative remedies and were not entitled to a pre-termination hearing (Pet. App. B1-C10). The Sixth Circuit affirmed *per curiam* (Pet. App. A1-A5).

The decision of the court of appeals was correct and the case presents no issue warranting further review.

2. Petitioners charged their immediate supervisor, defendant Nouse, and his superior, defendant Pieklik, with libeling them by issuing to them 90-day letters warning of their unsatisfactory performance, and by publishing the letters to other personnel at their place of employment. On the basis of affidavits from both Nouse and Pieklik the district courts found, and the court of appeals agreed, that all actions taken by them in connection with the discharge of petitioners were within the bounds of their official duties.

Nouse's affidavit stated that the 90-day warning letter was issued pursuant to 5 U.S.C. 4304 in the course of his official, statutorily prescribed duty—see 5 U.S.C. 4302-4303—to evaluate petitioners' performance; that the letter was disclosed solely through official channels to those required to see it; that no disclosure outside official channels was made; and that all his actions were taken within the scope of his official duties pursuant to Army policy (see Pet. App. B7-B8, C5). General Pieklik's affidavit stated that he was Nouse's commanding officer; that Nouse was officially authorized to evaluate petitioners' work performances and, if they were found unsatisfactory, to issue 90-day warning letters; that Nouse was required to coordinate and obtain concurrence with the 90-day warning letter from the Civilian Personnel Office and Nouse's superiors; and that to the best of his knowledge the only communication of the contents of the letter was through the official chain of command (see Pet. App. B5-B6, C5). Petitioners filed no affidavits to the contrary.[1]

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[1]Summary judgment was therefore appropriate, contrary to petitioners' assertion that facts alleged in their complaints raised triable issues, see Rule 56, Federal Rules of Civil Procedure (on motion for summary judgment supported by affidavits "an adverse party may not rest upon the mere allegations or denials of his pleading * * *").

The lower courts correctly held that respondents are covered by official immunity from suit for libel. See *Barr* v. *Matteo*, 360 U.S. 564. The appraisal of petitioners' performances, and the subsequent processing of that appraisal according to applicable agency regulations, was "an appropriate exercise of the discretion which" the defendants herein "must possess if the public service is to function effectively." *Id.* at 575; see also, *Howard* v. *Lyons*, 360 U.S. 593, 597-598. Allegations as to defendants' bad faith do not destroy the privilege. *Barr*, *supra*.

Petitioners' reliance on *Scheuer* v. *Rhodes*, 416 U.S. 232, an action brought in part pursuant to 42 U.S.C. 1983, is misplaced: nothing in that decision undermines the continuing validity of *Barr* v. *Matteo* in civil damage actions against federal officers for defamation. See 416 U.S. at 242, 247.

3. Petitioners have not availed themselves of their right to appeal their discharge either to their agency, see 5 C.F.R. 711.205, or to the Civil Service Commission, see 5 C.F.R. 752.203. The courts below thus correctly dismissed their claims for equitable relief for failure to exhaust administrative remedies. *McKart* v. *United States*, 395 U.S. 185; *Myers* v. *Bethelehem Shipbuilding Corp.*, 303 U.S. 41. Moreover, the Civil Service Commission is charged by statute with reviewing employee performance rating plans such as the one here challenged by petitioners, 5 U.S.C. 4306, and dismissal in light of the Commission's primary jurisdiction was accordingly also proper. *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59.

4. A post-termination hearing before the agency or the Civil Service Commission was available to petitioners pursuant to 5 C.F.R. Parts 771B and 772; they were not entitled to a pre-termination hearing. *Arnett* v. *Kennedy*, 416 U.S. 134.

5. There is no conflict between the court of appeals' holding in this case and *Fitzgerald* v. *Hampton*, 467 F.2d 755 (C.A. D.C.). There the court held that the Civil Service Commission's refusal to grant the plaintiff a hearing open to the public and the press "created an infirmity in the hearing which is a fundamental requirement of due process." *Id.* at 769. In the instant case no claim is made that a public hearing is being denied petitioners; nor does any other fundamental due process infirmity justify bypass of the administrative process.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

DOJ-1975-05